National Native Title Tribunal

Registration test decision

Application name	Arabana No. 2
Name of applicant	Aaron Stuart, Joanne Warren, Peter Watts, Desmond Dodd and Greg Warren (Snr)
State/territory/region	South Australia
NNTT file no.	SC2013/001
Federal Court of Australia file no.	SAD38/2013
Date application made	1 March 2013
Name of delegate	Carissa Kok

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

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

Date of decision: 10 May 2013

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Carissa Kok

Delegate of the Native Title Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 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 Arabana No. 2 claimant application to the Native Title Registrar (the Registrar) on 4 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 1 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.

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 C.

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 considered information from the following documents in reaching my decision:

- SC2013/001 Form 1 application and accompanying documents filed on 1 March 2013;

- a geospatial assessment and overlap analysis of the application area (geospatial assessment) by the Tribunal's Geospatial Services unit (Geospatial), dated 5 March 2013;
- certification of the application by South Australian Native Title Services (SANTS) provided to the Registrar by the applicant on 8 March 2013; and.
- the applicant's additional material received by the Registrar on 4 April 2013, being a report titled 'Table of Expert Opinions and Supporting Evidence against Propositions', prepared by [names removed] for the SC1998/002—Arabana Peoples Native Title Claim—SAD602/1998, dated February 2011.

I have also had regard to the documents contained in volume 1 of the SC2013/001 case management/delegates files (reference 2013/00462). Where I have had regard to information within that file, I have identified it in this statement of reasons.

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' (see s. 94D of the Act). 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 as follows:

- On 14 March 2013, the Tribunal wrote to the applicant and the State of South Australia (the State), informing them that the application was being considered for registration. The applicant and the State were also invited to provide any additional material/submissions in relation to the registration of the application for the Registrar's consideration.
- As stated above, additional material was provided to the Registrar by the applicant on 8 March 2013 (certification by SANTS) and 4 April 2013 (a report in relation to the SC1998/002—Arabana Peoples Native Title Claim—SAD602/1998 titled 'Table of Expert Opinions and Supporting Evidence against Propositions').

- On 9 April 2013, the Tribunal wrote to the State to advise that additional material from the applicant had been received by the Registrar and identified the two documents received on 8 March 2013 and 4 April 2013. The State was informed that the Registrar sought an undertaking from the State regarding the confidentiality of the documents, prior to supplying the State with the additional material so that it provide any comments on the material.
- On 11 April 2013, the State wrote to the Tribunal to confirm that it did not wish to see the additional material provided by the applicant.
- On 17 April 2013, the State also confirmed in writing that it did not intend to make any submissions in relation to the registration of the Arabana No. 2 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, I understand that the condition in s. 190C(2) is of a procedural kind and 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. Section 190C(2) does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)—*Northern Territory of Australia v Doepel and Others* [2003] FCA 1384 *(Doepel)* at [16] and [35] to [39].

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

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

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

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

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

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

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

Schedule A and Attachment A provide information to describe the native title claim group (I consider the merits of the description at s. 190B(3) below). I have considered this information in Schedule A and Attachment A as well as the application overall. There is nothing on the face of the application that leads me to conclude that the description of the native title claim group does not include all of the persons in the group, or that it is a subgroup of the native title claim group.

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).

Part B provides the name and address for service of the applicant.

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

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

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

Schedule A and Attachment A provide information to describe the native title claim group.

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

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

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

The application is accompanied by affidavits from the five persons comprising the applicant. Each of the affidavits contains the statements required under this section.

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) because it does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

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

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

Attachments B(1) and B(2) provide information describing the areas covered and not covered by the application.

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).

Attachment C contains a copy of a map of the application area.

Searches: s. 62(2)(c)

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

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

Schedule D states that '[n]o searches have been carried out by the applicants to determine the existence of non native title rights in relation' to the application area.

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

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

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

Schedule E provides a description of the native title rights and interests claimed in relation to the application area. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist or have not been extinguished.

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).

Schedules A, F and M, and Attachment A provide 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 provides a list of activities carried out by the claim group in relation to the application area.

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

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

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

Schedule H states that the application area 'is not overlapped by any other claim'.

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).

Schedule HA states that the applicant is 'not aware of any notifications given under this section of the Act'.

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 states that the applicant is 'unaware of any notices given under s29 of the Act or under any corresponding provisions of law in South Australia relate [sic] to the area of the claim'.

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).

The application before me was made on 1 March 2013 when it was filed in the Court. On 12 April 2013, the SC2013/003—Walka Wani Oodnadatta—SAD78/2013 application was filed which overlaps the current application. Based on my own searches of the Register of Native Title Claims (Register), I have concluded that on the date the current application was made and at the date of this registration decision there were/are no applications on the Register that cover any part of the current application.

Thus, as there are no relevant 'previous applications' I am satisfied that s. 190C(3) is met.

Subsection 190C(4)
Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Under s. 190C(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 of 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.

In *Doepel*, the Court found that the Registrar's task at s. 190C(4)(a) is simply 'to be satisfied about the fact of certification by an appropriate representative body'—at [78].

I am not to inquire about the fact of authorisation but I do ensure that:

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

Schedule R states that the 'Certificate of Authorisation from South Australian Native Title Services Inc. will be provided to the Registrar when it is received by the Applicant'.

On 8 March 2013, the applicant's legal representative provided the Registrar a copy of the relevant certificate from SANTS. The certificate is signed by the Chief Executive Officer of SANTS and is dated 7 March 2013. The certification by SANTS includes these statements:

1. [SANTS] performs all the functions of a representative body for the Greater South Australia region pursuant to section 203FE of [the Act].
2. ... The functions and powers of SANTS are set out in ... Section 203B of [the Act].
3. SANTS is requested to exercise its certification function under section 203BE(1) in relation to an Arabana Peoples native title claim over areas known as the Unclaimed Triangle and the Oodnadatta Common.

Schedule K of the application provides a statement to the effect that SANTS is the only representative body for the application area. The geospatial assessment confirms that SANTS is the only representative body for the entire application area.

On the basis of the above, I am satisfied that the application has been certified by the only representative body for the application area and that it has the power to make the certification.

I now consider whether the certificate by SANTS contains the information required by Part 11, with specific regard to s. 203BE(4).

Pursuant to s. 203BE(4), the certification must contain certain information and opinions:

> (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).

Subparagraphs 203BE(2)(a) and (b) require that:

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

I set out the requirements of subsection 203BE(3) further below where I address the particular requirements of s. 203BE(4)(c).

The requirements of s. 203BE(4)(a)

The certificate contains a statement that 'SANTS is of the opinion that the requirements of section 203BE(2)(a) and (b) ... have been met'. The certificate also includes the specific statements set out in ss. 203BE(2)(a) and (b)—the certificate at [4]. I am satisfied that the certification complies with s. 203BE(4)(a).

The requirements of s. 203BE(4)(b)

The certification by SANTS includes its reasons for being of the opinion that ss. 203BE(2)(a) and (b) have been met—the certificate at [5.1] to [5.9]. In summary, these reasons are:

- All persons who identify as Arabana People were invited to attend a community meeting on 21 and 22 April 2012 in Port Augusta. The filing of a native title claim over areas known as the Unclaimed Triangle and the Oodnadatta Common was discussed. Upon request, SANTS provided assistance to persons to attend the meeting.
- SANTS has for many years worked closely with members of the Arabana People. Extensive genealogical and anthropological research has been undertaken to identify all persons who identify as Arabana in relation to SAD6025/98 (the group's first application) which has been determined by consent.
- A consideration of the persons in attendance at the meeting demonstrates that descendants from each of the group's apical ancestors were present and that Arabana families 'of polity' were represented by those in attendance.
- SANTS is of the opinion that the meeting was representative of Arabana People.
- Copies of the draft application were distributed to representatives at the meeting. The draft application and associated documents were discussed in detail. Each representative had the opportunity to comment, provide feedback and engage in discussion about the terms of the proposed new application.
- The process was inclusive and open.
- In accordance with a process of decision-making agreed to and adopted by the native title claim group, the group authorised the application to make the application. (There being no applicable traditional decision-making process for these kinds of matters.) The intention of the meeting representatives was that the applicant would deal with matters in relation to the application. This is reflected in the discussion of who should comprise the applicant for the new application.
- The description of the claim group in the application substantially replicates the native title holder description in the SAD6025/1998 Arabana People's Native Title Claim consent determination. Given this 'determined description' of the Arabana People, SANTS is of the opinion that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all other persons in the native title group.

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

The requirements of s. 203BE(4)(c)

As set out above, this subsection refers to the requirements of s. 203BE(3), which requires 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.

The certification includes a statement that 'SANTS is aware that another [application] is proposed to be ... filed in relation to the Oodnadatta Common' (which comprises part of the application area). It is also stated that 'SANTS has communicated with the Arabana People No. 2 application [sic] about this proposed application to discuss holding a meeting between the native title claimant groups or their representatives', and, that 'SANTS has made all reasonable efforts in the circumstances to meet the requirements of section 203BE(3)'—the certificate at [6] to [8].

Conclusion

I note that, when undertaking a consideration under s. 190C(4)(a), it is not my role to examine matters relating to the basis on which a certification was provided, including the sufficiency or legitimacy of the reasons why the certifying bodies hold the opinions they do—*Doepel* at [80]; *Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [32].

In my view, the application has been certified by the only representative body that could so certify and the certification contains the statements required by s. 203BE(4).

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).

In considering s. 190B(2), I have only assessed the information in the application—*Doepel* at [122].

Written description

Schedule B refers to Attachments B(1) and B(2) which are titled, respectively, 'Technical Description: Arabana People Native Title Claim', and 'Arabana No. 2 Native Title Claim'.

Attachment B(1) includes a metes and bounds description for the two parts of the application area. The metes and bounds description references native title determination boundaries, the Frome River, allotment boundaries and geographic coordinates referenced to the Geocentric datum of Australia 1994 (GDA94) to six decimal places. The description specifically excludes any areas covered by the following native title determinations:

- SAD6017/98 Dieri Native Title Claim (SC97/4);
- SAD6025/98 Arabana People (SC98/2);
- SAD6001/98 Adnyamathanha No. 1 (Stage 1) (SC99/1); and
- SAD6022/98 Yankunytjatjara Antakirinja (SC97/9).

Attachment B(2) provides a description of general areas excluded from within the external boundaries of the application area.

Map

Schedule C refers to Attachment C which is named 'Arabana No. 2 Native Title Claim'. Attachment C contains a copy of a map titled 'Arabana People' and was prepared by Geospatial on 15th January 2013. The map includes:

- both parts of the application area depicted by dark blue outline and stipple fill;
- tenure shown and allotments labelled;
- native title determination boundaries shown and labelled;
- the town of Oodnadatta shown and labelled;
- a locality diagram;
- scalebar, northpoint, coordinate grid; and
- notes relating to the source, currency and datum of data used to prepare the map.
- and datum of data used to prepare the map.

My assessment

I have considered all the information provided in the application to identify the application area. I have also had regard to the geospatial assessment of the application area which concluded that the 'description and map are consistent and identify the application area with reasonable certainty'.

Having regard to the general exclusions listed in Attachment B(2), I am satisfied that this information provides an objective mechanism to identify those areas within the external boundaries that are not covered by the application.

In my view, the information and map provided to describe the application area is sufficient for identifying with reasonable certainty, the areas covered and not covered by the application.

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).

As the application does not name the persons in the native title claim group but provides a description of those persons, a consideration under s. 190B(3)(b) is applicable.

Doepel is authority that the focus of s. 190B(3)(b) is on:

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

Following *Doepel*, I have only considered the information contained in the application—at [16].

At Schedule A, the native title claim group is described as follows:

> The Native Title Claim Group comprises those Aboriginal People who both self-identify as Arabana and are recognised as being Arabana by other Arabana people based on:
>
> 1. Filiation, including by adoption, from an Arabana parent or grandparent; or
> 2. Long term co-residence with Arabana people on Arabana country;
>
> and who satisfy one or more of the following criteria:
> (a) Being raised in Arabana country and being bound by its system of law and custom;
> (b) Living and behaving appropriately with Arabana people in accordance with Arabana laws and customs;
> (c) Having knowledge of Arabana country and its stories and taking appropriate responsibility, under Arabana custom adn [sic] law, for that knowledge;
> (d) Having knowledge of Arabana society and the relationships of people within it and seeking to maintain proper relationships amongst Arabana people;
> (e) Having knowledge of Arabana language;

(f) Displaying an active interest and engagement in Arabana affairs.

Attachment A also contains the following information in relation to 'Profiles of Antecedents of the claim group listed in Schedule A':

STRANGWAYS

The Arabana native title claim group acknowledge Lily Rang *(Buguwide)* Strangways, the parents of siblings, Sarah *(Gadjibuga),* Henry *(Wapili),* Clara *(Midlangla),* Fred *(Murilli)* and Sidney as the antecedents of the Strangways family and their descendants;

ADAMS

Gina Adams, the mother of Jessie (who married Sandhill Jack), is acknowledged by the Arabana people to be the antecedent of the Adams Family and their descendants;

AMOS
Jacob is acknowledged by the Arabana native title claimant group to be the apical ancestor of the Stanley Amos family. Jacob's daughter, Millie, married and was the first wife of Stanley Amos. Millie and Stanley Amos and their descendants are acknowledged as part of the native title claim group;

STEWART, WARREN, WOODS, DODD AND BUZZACOTT
Barralda Bunda, and Arabana woman and the mother of *Barralda Coupa* (also known as Laura) is acknowledged by the Arabana native title claim group to be the antecedent of the Stewart, Warren, Woods, Dodd and Buzzacott families and their descendants/

CONWAY
Aggie (who was married to Jim Conway), is the mother of siblings Florrie, Eddie, Clancy and Ida Conway and is acknowledged by the Arabana claimant group as the Conway Family and their descendants;

WARRINA, DUCK and GEPP
Johnny Warrina, the father of siblings, Lexie, Roy, Maudie, Lennie and Alma Warrina, are acknowledged by the Arabana claimant group as the antecedents of the Warrina, Duck and Gepp families and their descendants;

ALLEN
The mother of Tim Allen, who married Frank Allen, is acknowledged by the Arabana claimant group to be the antecedent of the Allen family and their descendants.

SAMUELS
Topsy and Allen Samuels, the parents of Ruby, are acknowledged by the Arabana claimant group to be the antecedents of the Samuels family and their descendants.

STUART
An Arabana woman who married Adam Ferguson, and who is the mother of Louise (who married Ted Stuart) is acknowledged by the Arabana claimant group to be the antecedent of the Stuart family and their descendants.

The description of the native title claim group (provided in Schedule A and Attachment A) relies on rules of both self-identification and recognition by other Arabana people. The primary principles upon which this self-identification and recognition must be based are:

1. filiation, including by adoption from an Arabana parent or grandparent; or
2. long term co-residence with Arabana people on Arabana country.

Further, membership of the claim group also requires the satisfaction of at least one of the six criteria described in Schedule A at (a) to (f), as extracted above.

In *Western Australia v Native Title Registrar* [1999] FCA 1591 the Court observed that the relevant question in that case (regarding s. 190B(3)), was whether applying the specified criteria or 'rules' described the native title claim group sufficiently clearly so that it could be ascertained whether any particular person is in that group—at [67]. Carr J stated that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently...The Act is clearly remedial in character and should be construed beneficially—at [67].

In my view, the description of the claim group includes an external reference point for making an inquiry into whether a person both self-identifies as Arabana and is recognised as being Arabana by other Arabana people, being the names/identification of Arabana antecedents and the names of their children—provided in Attachment A. Thus, I consider that it would be possible to ascertain whether a person fulfils the rule of self-identification and recognition based on the first principle of filiation from an Arabana parent/grandparent.

I also consider that it would be possible to make an inquiry into whether a person meets the requirement under the second principle by which a person can both self-identify and be recognised as being Arabana, being 'long term co-residence with Arabana people on Arabana country'. There is no definition of 'long term' in Schedule A, which, it could be argued, renders this part of the claim group description not sufficiently clear. However, in following the principles of statutory interpretation, I have read the description at Schedule A as a whole and consider the meaning of 'long term' in the context of the overall description. Having regard to the six other criteria set out in Schedule A at (a) to (f), in my view, it is reasonable to infer that 'long term co-residence with Arabana people on Arabana country' would entail such co-residence stretching over a significant period of a person's life. That is, over a timeframe sufficient to allow that person to also be able to satisfy at least one of those six criteria, as required by the overall requirements for membership.

Therefore, it is my view that by conducting a factual inquiry into whether a person meets the rules and specified criteria described in Schedule A and Attachment A, it would be possible to ascertain whether that person is a member of the native title claim group. While the necessary inquiries may not be easy, in my view, this should not mean that an insufficient or unclear description has been provided for the purpose of s. 190B(3)(b).

I am satisfied that the description of the native title claim group provided in the application is sufficiently clear and enables the reliable identification of persons in the claim group.

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

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

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

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

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

1. The nature and extent of the native title rights claimed and interests in relation to the claim area are non-exclusive rights to use and enjoy in accordance with the native title holders' traditional laws and customs the land and waters of the Claim Area, being:
   (a) the right to access and move about the Claim Area;
   (b) the right to live, to camp and, for the purpose of exercising their native title rights and interests, to erect shelters and other structures on the Claim Area;
   (c) the right to hunt and fish on the land and waters of the Claim Area;
   (d) the right to gather and use the natural resources of the Claim Area such as food, medicinal plants, wild tobacco, timber, resin, ochre and feathers, but excluding those resources referred to in Paragraph 12;
   (e) the right to share and exchange the subsistence and other traditional resources of the Claim Area;
   (f) the right to use the natural water resources of the Claim Area;
   (g) the right to cook on the Claim Area and to light fires for domestic purposes but not for the clearance of vegetation;
   (h) the right to engage and participate in cultural activities on the Claim Area including those relating to births and deaths;
   (i) the right to conduct ceremonies and hold meetings on the Claim Area;
   (j) the right to teach on the Claim Area the physical and spiritual attributes of locations and sites within the Claim Area;
   (k) the right to visit, maintain and protect sites and places of cultural and religious significance to native title holders under their traditional laws and customs on the Claim Area; and
   (l) the right to be accompanied on to the Claim Area by those people who, though not native title holders, are:
      (i) spouses of native title holders, or
      (ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Claim Area or;
      (iii) people who have rights in relation to the Claim Area according to the traditional laws and customs acknowledged by the native title holders.

The native title rights and interest claimed are also subject to the effect of:
   (a) all existing non native title rights and interests;
   (b) all laws of South Australia and the Commonwealth of Australia;
   (c) valid interest conferred under those laws.

In my view, the description of the claimed native title rights and interests contained in the application is clear and easy to understand. I am satisfied that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

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.

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

The test at s. 190B(5)

For the application to meet s. 190B(5), I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist and to support the particularised assertions in paragraphs ss. 190B(5)(a) to (c). Mansfield J said in *Doepel* that:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the `factual basis on which it is asserted' that the claimed native title rights and interests exist `is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts—at [17].

This approach to s. 190B(5) was approved by the Full Court in *Gudjala FC* at [82] to [85].

The test in s. 190A involves an administrative decision. It is not a trial or hearing of a determination of native title pursuant to s. 225, and therefore it is not appropriate to apply the standards of proof that would be required at such a trial or hearing. My task, therefore, is not to make findings about whether or not the claimed native title rights and interests exist. It is not my role to reach definitive conclusions about complex anthropological issues pertaining to the applicant's relationship with their country as that is a judicial enquiry.

To that end, the Full Court has said that a 'general description of the factual basis' (as required by s. 62(2)(e)) could certainly be of a sufficient quality to satisfy the Registrar for the purpose of s.

190B(5). However, the Full Court also said 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'—*Gudjala FC* at [90] to [92].

Information considered

Attachment A to the application provides profiles of antecedents of the claim group.

Schedule F of the application, in summary, provides the following information in support of the applicant's factual basis:

- The claim group hold native title over areas that abut the application area, which was found by the Court in the SC1998/002—Arabana People's Native Title Claim—SAD6025/1998 (Arabana No. 1) consent determination on 22 May 2012—*Dodd v State of South Australia* [2012] FCA 519.
- The 'factual basis for the assertion of the claimed rights has been documented in the Table of Expert Opinions and Supporting Evidence prepared by [names removed] (which has been provided as additional material directly to the Registrar). This report was prepared for submission to the State in support of the Arabana No. 1 proceeding.
- That part of the application area that is located in/immediately surrounds Oodnadatta was originally part of the Arabana No. 1 application but was later excluded to enable a planned transfer of the area to a community body at Oodnadatta. This subsequently did not proceed.
- The 'traditional laws and customs recognised in the ... [Arabana No. 1] claim are the same laws and customs that apply to this claim group and their rights to hold native title over the' application area.

Schedule M also provides information that particular (named) members of the claim group have lived in and around the application area near Oodnadatta, for many years/most or all of their lives. It is asserted that the claim group have maintained a traditional physical connection with the application area by undertaking activities such as visiting, attending to cultural responsibilities, heritage protection, attending meetings, camping and hunting, in accordance with the traditional laws and customs taught to them by their Elders. Schedule M also states that the 'continuing traditional connection by the claim group to the adjoining land was recognised in the determination of the ... [Arabana No. 1] claim'.

When making an assessment under this condition I may have regard to information other than that which is contained in the application—*Doepel* at [16].

Thus, I have had regard to the additional material provided by the applicant to the Registrar on 4 April 2013, being the report titled 'Table of Expert Opinions and Supporting Evidence against Propositions' prepared by [names removed] in relation to the Arabana No. 1 proceeding, dated February 2011 (the anthropological report).

I have also had regard to the findings of the Court in *Dodd v State of South Australia* [2012] FCA 519 (the Arabana No. 1 consent determination), which is referred to in the application in Schedules F and M. As referenced above, the application explains that the claim group hold native title in the Arabana No. 1 consent determination area that adjoins the application area. Thus, I consider the reasons for judgment in this consent determination to be relevant to my consideration under s. 190B(5).

In the decision of *Cadbury UK Ltd v Registrar of Trade Marks* [2008] FCA 1126 *(Cadbury)*, the Court observed that:

> The evidence to which an administrative tribunal may have regard can include evidence that has been given in another proceeding, including a court proceeding, provided the evidence is relevant to an issue before the tribunal: In *re A Solicitor* [1993] QB 69 at 77. A tribunal may also accept as evidence the reasons for judgment given by a judge in other proceedings. But if the tribunal takes the approach that it should not disagree with findings made by the judge then the tribunal has fallen into error. The general rule is that a tribunal that is required to decide an issue will be in breach of that obligation if it merely adopts the decision of the judge on the same issue…I do not mean to imply that reasons for decision given by a judge are irrelevant to an administrative tribunal. First of all, those reasons may…be received into evidence. They must then be given some weight. Indeed, the judge's findings may be treated as prime facie correct. On the other hand, if the judge's findings are challenged, the tribunal must decide the matter for itself on the evidence before it: *General Medical Council v Spackman* [1943] AC 627—at [18].

In considering the Arabana No. 1 consent determination, I do not merely adopt the reasons of Finn J for that determination. That would not be appropriate or possible given that my consideration must deal with matters relating to areas not covered by the Arabana No. 1 consent determination. I also do not have before me the same material or evidence that was before Finn J in making that consent determination. However, I may consider Finn J's reasons in the Arabana No. 1 consent determination as part of the applicant's factual basis and give his Honour's reasons significant weight. In my view, they have obvious relevance to some parts of the registration test, primarily s. 190B(5) (and s. 190B(6)) and the applicant's factual basis.

Further, I consider that Finn J makes findings in the Arabana No. 1 consent determination in relation to similar issues before me but under a much higher threshold test than is provided for under s. 190B(5). In these circumstances, therefore, it would not be appropriate if I did not give significant weight to the reasons for judgment by Finn J. I note that it is stated in *Cadbury* that 'the judge's findings may be treated as prime facie correct'—at [18].

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).

On this aspect of the factual basis, not criticised by the Full Court in *Gudjala FC*, Dowsett J directed that one must look for an association 'between the whole group and the area' but without the necessity for each member to have had an association at all times. There must also be material to support an association between the predecessors of the group and the claim area since sovereignty—*Gudjala 2007* at [52] and *Gudjala FC* at [90] to [96].

In my assessment under this subsection, I have considered information from the application, the anthropological report and the reasons for judgment by Finn J in the Arabana No. 1 consent determination. I note that the anthropological report is also referenced as evidence considered by his Honour in making the consent determination—reasons for judgment in Arabana No. 1 consent determination at [12].

I reference particular parts of the information I have considered in my reasons below.

Where is the application area?

The application identifies that, as referenced above, the application area abuts the Arabana No. 1 consent determination area, in relation to which the claim group hold native title. The application also explains that, that part of the application area surrounding Oodnadatta was originally part of the Arabana No. 1 application however was later excluded to enable a planned land transfer which subsequently did not occur—Schedule F at [(h)].

Having regard to the map at Attachment C, it is evident that the application area comprises two portions abutting the northwest and southeast boundaries of the Arabana No. 1 consent determination area. The two portions of the application area appear to consist of relatively small areas. (The geospatial assessment identifies that the application area comprises approximately 438 square kilometres; and the reasons for judgment in the Arabana No. 1 consent determination state that the determination area covers approximately 68,823 square kilometres—at [2]). The portion of the application area to the northwest of the Arabana No. 1 consent determination area comprises Oodnadatta and its immediate surrounds. The remainder of the application area adjoining the southeast of the Arabana No. 1 consent determination area covers areas within two pastoral lease boundaries, being parts of the Witchelina and Mundowdna pastoral lease areas.

The association of the claim group and its predecessors to the application area since sovereignty

I refer to these passages from the reasons for judgment in the Arabana No. 1 consent determination, which I consider provide support for the applicant's assertion under subparagraph 190B(5)(a):

> 30. The relevant date of sovereignty for this area is 1788. The area to the west of Lake Eyre, which forms the substantial part of the claim area, has been recorded historically as being traditional Arabana country. The State accepts the proposition that people identified as Arabana (or Urabanna) occupied a substantial portion of the claim area at the time of sovereignty.
>
> 31. ...
>
> 32. In the opinion of the experts, it can be inferred that members of the contemporary claim group are the descendants or successors of people who were native title holders for the claim area at sovereignty.
>
> 33. On the basis of the records of the Basedow expedition in 1920 and oral testimony from their informants, the experts demonstrate connections between members of the claim group and persons recognised as Arabana back to the mid to late 19th century.
>
> 34. For the purposes of reaching an agreement under s 87 of the Native Title Act, it would be proper to infer, on the basis of the historical literature and in the absence of any evidence to the contrary, that those people identified by the experts as Arabana at around the turn of the 20th century derived, through a traditional process of transmission, rights and interests in the claim area from those persons who held them at sovereignty.
>
> ...

42. Substantial evidence was provided of the continuing connection of members of contemporary Arabana society by their laws and customs with a substantial part of the claim area through their laws and customs.

43. The State raised the proposition that the association of the Arabana people to the south-eastern portion of the claim area was not traditional, but resulted from historic circumstances such as the move of [name removed] from Anna Creek to Finniss Springs in 1919 and the attraction of Marree as a regional hub. The experts did not agree with this proposition.

44. The experts presented historical evidence of Arabana place names in the area (taken from Hillier's 1904 map of Reuther place names), together with evidence of knowledge of Arabana Uluraka sites (related to place names), which led the experts to conclude that the Arabana have long-standing traditional interests in the southeast of the claim area. They considered that whilst there was evidence that the Kuyani people might also have traditionally held some rights and interests in this area, in their opinion those rights had been transmitted, by way of a traditional process, to the Arabana people. This opinion was supported by oral evidence and by evidence of intermarriage between Arabana and Kuyani peoples in earlier generations.

45. The State is of the view there is sufficient evidence of a traditional Arabana connection to the southern portion of the claim area, coupled with extensive contemporary connection, which justifies a consent determination being made over that area in favour of the Arabana.

46. It was the opinion of the experts, amply supported by the evidence, that contemporary connection to country by Arabana people continues to be governed by laws and customs, including those which go to authority, gender and knowledge of the physical and cultural geography of the claim area, including Ularaka.

47. The Evidence indicates that the term "Ularaka" has two different, but related, meanings. Firstly, the term Ularaka can be translated as that body of knowledge, custom and law now commonly referred to as 'dreaming'. The term also refers to (patrifilial) land holding groups called Ularaka who are charged with the care of particular localised Ularaka (dreaming) manifested in song, object and site.

48. ...

49. There is substantial evidence that senior members of the group are familiar with the traditional Ularaka and the normative rules related to those Ularaka, such as the gender specific sites, the songs with which various sites are associated, and requirements as to when and by whom and in whose presence those songs can be sung, as well as the responsibility for looking after significant sites.

50. A number of Ularaka, many of which have previously been recorded by earlier researchers, is in evidence. The Evidence indicates considerable contemporary knowledge by members of the claim group of the 'Ularaka', that the 'Ularaka' has been a feature of Arabana law and custom since a time prior to sovereignty, and that the contemporary knowledge and practices of members of the claim group indicates the evolution of these traditions in a manner consistent with Arabana law and custom.

...

53. The Evidence shows that a significant number of Arabana people continue to have a physical connection with the determination area and regularly access the area for traditional purposes. A number of contemporary Arabana claimants continue to live on the claim area, including in Marree, at Finniss Springs, and on a number of the pastoral stations, including Macumba, Nilpinna, Anna Creek, and Stuart Creek. A number of contemporary claimants were born or raised on the claim area and have lived on the claim area for periods of their life. Others have worked across the claim area. A number of the ancestors of contemporary claimants are buried on the claim area.

54. The Evidence shows that contemporary Arabana people continue to have a detailed knowledge of the claim area, its water sources, flora and fauna, and cultural geography.

55. Whilst the need for bush tucker has diminished, there is evidence that a number of claimants continue to access the resources of the claim area for flora and fauna, wood and water. Arabana people continue to hunt on the claim area, including for kangaroos, bush turkey, rabbit and lizards, including perente, kadni and kalta. There is also evidence that Arabana people continue to have knowledge of bush tucker and bush medicine, which is transmitted to younger generations. This includes knowledge of where and when to find resources such as yalka, edible berries, milky bush, bush tomato, bush cucumber, and bush potato.

56. Whilst Wilyaru and other ceremonies no longer occur on Arabana land, Evidence shows that Arabana people still meet regularly on country for important communal events such as annual reunions, funerals and special birthdays, as well as rodeos, races and bronco brandings. In the opinion of the experts, these communal gatherings remain an important element of Arabana custom and law and provide an important context in which 'proper' Arabana behaviour is practised, monitored and transmitted between generations. It provides a forum in which membership of Arabana society is activated, maintained and policed.

57. ...

58. Evidence was given of the importance to Arabana people of protecting their country, in particular, the preservation of their mound springs and other water sources, which are both critical natural resources and the loci of many Ularaka. Arabana people have sought over a number of years to have areas and places of significance entered on the heritage register under the *Aboriginal Heritage Act 1988* (SA) and there are a large number of recorded sites across the claim area.

Finn J's reasons for judgement in the Arabana No. 1 consent determination make reference to the importance of Ularaka to the group, in connecting the Arabana to their country (as discussed in the extracted passages above). I note that his Honour states that '**the 'Ularaka' has been a feature of Arabana law and custom since a time prior to sovereignty,** and ... the contemporary knowledge and practices of members of the claim group **indicates the evolution of these traditions in a manner consistent with Arabana law and custom (emphasis added)**—at [50]**.**

Many specific Arabana 'Ularaka' (dreaming) sites and related songs/stories are described in extensive detail throughout the anthropological report. For instance, the anthropological report identifies Ularaka sites located in the application area. One Ularaka relates to the Frog/main Frog History that belongs to the Arabana people and starts from Hookey's waterhole (in the application area near Oodnadatta) and travels 'down the Neales ...' (the Neales River runs

through the application area). Another Ularaka relates to 'a hill near Oodnadatta where the Old Men pooed'—pp. 201, 202 and 204[1].

The anthropological report also includes the following information, in summary:

- The names of 27 claim group members (being the informants that the anthropologists worked with during the fieldwork for the report) and the identification of their Arabana parents and/or grandparents, including details about where they were born, grew up, lived, visited and/or worked. Particular localities are referenced including Marree, Oodnadatta, Finniss Springs Station, Callanna, Alberrie Creek, Stuart Creek, Curdimurka, Witchelina, Macumba and Woodduck—being places in the application area/its surrounds. Birth dates are provided for most of the named claimants; the earliest dates provided relate to eight persons who were born during the 1930s—at pp. 3-15.
- Named claimants currently living in Oodnadatta visit/used to work on the stations at Allendale [Allandale] (immediately surrounding Oodnadatta) and Macumba (nearby vicinity of Oodnadatta)—at p. 278.
- A named claimant used to camp around Marree and Callanna when he was a kid, digging 'yalka', chasing lizards. Sometimes he would go to Finniss Springs or Stuart Creek—at p. 282.
- Finniss Springs is a place of significance to the group and is an area that many claimants continue to visit regularly, as they did when they were children. Many claimants have lived at Finniss Springs and there existed a substantial Aboriginal community and ration depot there until the 1960s (some Arabana people continued to live there into the 1970s)—at p. 282-285.
- Some claimants work on Macumba station and Macumba continues to be an area where claimants visit regularly, including for camping—at pp. 285-287.
- Named claimants used to work on Witchelina (station)—pp. 290-291.
- Comprehensive details demonstrating relationships between current claimant families and their predecessors, and links between the predecessors to Arabana country, including with areas in the nearby surrounds of the application area. These links are described either directly or by inference spanning back to the mid to late 1800s—at pp. 100-127.

I understand that European settlement of the region in which the application area is located occurred from the late 1850s, having regard to the reasons for judgment in the Arabana No. 1 consent determination:

> The first contacts between Europeans and the Aboriginal inhabitants of the Lake Eyre region occurred in the late 1850s in the course of separate expeditions by the explorers Babbage, Warburton, Gregory and J McD Stuart. Pastoral settlement of the area closely followed the activities of the explorers—at [7].

Therefore, if I can be satisfied that there is sufficient factual basis to support the assertion that the claim group's predecessors have had an association with the application area since first European settlement in the area (from the late 1850s), then, in my view, I can reasonably infer that the group's predecessors have had an association with the area since sovereignty in 1788.

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[1] I discuss the group's Ularaka further in my reasons at s. 190B(5)(b). That particular information I reference below is therefore also relevant to my consideration under this subsection.

As I have discussed above, it is my view that in making the Arabana No. 1 consent determination, Finn J considered issues similar to the issues before me but under a much higher threshold test than is required of my consideration under s. 190B(5). Therefore, where Finn J has made findings in relation to the group's links to, and relationship with, the area covered by the Arabana No. 1 consent determination (as extracted in the passages above), in my view, this information is pertinent to my consideration of the claim group and its predecessors' association with the application area.

The Court has found that the same group of people who claim native title in the application before me, hold native title over a relatively large area of country. Therefore, if it is legally accepted that the claim group and its predecessors have had a traditional connection with the group's determined country since sovereignty, then, in my view, it is reasonable to infer that the claim group and its predecessors have had an association with the two much smaller adjoining areas comprising the application, since sovereignty.

The anthropological report provides an abundance of comprehensive factual information in support of the applicant's assertion under s. 190B(5)(a). The examples that I have referenced above provide details directly linking the claim group to particular localities in the application area or its immediate/nearby surrounds, such as Hookey's waterhole, Allandale, Marree, Oodnadatta, Finniss Springs Station, Callanna, Alberrie Creek, Stuart Creek, Curdimurka, Witchelina, Macumba and Woodduck.

Altogether, I consider that there is much information available in support of the assertion in s. 190B(5)(a). In my view, there is sufficient material before me to support the asserted ongoing association by members of the claim group and their predecessors with the application area since sovereignty. Further, I consider that there is a sufficient factual basis for the asserted link between the claim group and its predecessors, as a whole, and that demonstrates their continued association with the application area over the period since sovereignty.

In my view, there is a sufficient factual basis in support of the assertion that the native title claim group and its predecessors have had an association with the area since sovereignty.

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

I am **satisfied** that there is a sufficient factual basis in support of the assertion in s. 190B(5)(b).

This subsection requires that I be satisfied that there is a sufficient factual basis in support of the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claimed native title rights and interests.

In *Gudjala 2007*, Dowsett J outlined his understanding of the principles drawn from *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (*Yorta Yorta*) in order to examine the factual basis provided in support of the assertion at s. 190B(5)(b) (and similarly at s. 190B(5)(c)). In his Honour's summary of those relevant passages from *Yorta Yorta,* Dowsett J also recognised the importance of understanding the meaning attributed to 'native title' pursuant to s. 223 of the Act—*Gudjala 2007* at [26]. These aspects of the decision by Dowsett J were not criticised by the Full Court in *Gudjala FC* at [90] to [96].

Dowsett J's examination of *Yorta Yorta* led him to form the view that a necessary element of this aspect of the factual basis is the identification of the relevant Indigenous society at the time of

sovereignty or, at the very least, the time of first contact. Once identified, it follows that the factual basis must reveal the existence of laws and customs with a normative content that are associated with that society. That is, that the factual basis be capable of providing support for an asserted 'relationship between the laws and customs now acknowledged and observed in a relevant Indigenous society, and those which were acknowledged and observed before sovereignty'—*Gudjala 2007* at [26], [66] and [81].

I refer to the passages above that I have extracted from Finn J's reasons for judgment in the Arabana No. 1 consent determination, in relation to s. 190B(5)(a). In my view, that information is also relevant to my consideration at s. 190B(5)(b). Additionally, I have had regard to the following findings by the Court:

> 26. The Evidence suggests that there remains a distinct social group which identifies as "Arabana", and which observes normative rules about succession to membership of the group.
>
> 27. The experts consider that it is likely that Arabana mechanisms of succession are, as a result of the radical pressures arising from settlement and de-population of their traditional country, undergoing transition from a system which has two cross-cutting principles - matrifiliation (as a system of social organisation and marriage preferences) and patrifiliation (as a basis for land rights) into a system in which the transmission of connection to country is established through membership of families based on cognatic descent.
>
> 28. As a consequence, the experts consider that membership of contemporary Arabana society is based on filiation, including by adoption, from a recognised Arabana person as mother, father or grandparent. Based on their investigations, the experts also concluded that long term co-residence with Arabana people on Arabana country could result in a person being identified as Arabana, provided the wider Arabana society recognises them as a member.
>
> ...
>
> 35. The State and the applicants agreed at the outset that classical Arabana society formed part of what is now known as the Lakes cultural grouping and was defined by the following key features:
>
> (i) A system of kinship and marriage, underpinned by the practice of exogamy and the avoidance of incest, which was central to defining relationships between Arabana people, and between Arabana people and the land. This classical Arabana kinship system was characterised by –
>
> (a) a classificatory kin system which attributed kin terms to classes of relationships and in turn predicated normative behaviour between those classes of relationships;
>
> (b) two exogamous matrilineal moieties known as Mutherri (Matthurie) and Kararru (Kirirawa) as well as by exogamous totemic divisions which regulated marriage and were significant in some ceremonial responsibilities; and
>
> (c) preferential marriage rules which were indicated in the classificatory kin system and which oriented marriage (and ceremonial) relationships;

(ii) A division into small localised groups with particular association with certain areas within Arabana country. Some members of those smaller groups would come together for ceremony, trade and major decision making;

(iii) A distinct language comprising a number of closely related dialects; and

(iv) A male initiation process that included the Wilyaru ceremony.

36. The Evidence indicates that there has clearly been some transformation in some of the characteristics of the 'classical' Arabana society as described above since sovereignty. The traditional customs and laws concerning social organisation and group membership have transformed since settlement, as a consequence of the demographic pressures of radical depopulation and displacement from estates. Similarly, classical marriage rules (such as the requirement that marriage partners be of the opposite matrilineal moieties and the regulation of marriage by reference to totemism) are no longer observed or even remembered by younger claimants.

37. However, it is the opinion of the experts that

> ...the Arabana system of kinship and marriage has... evolved since sovereignty in ways that are founded in and consistent with the classical system. Kinship relations, and their normative expression, continue to structure all aspects of Arabana life. Exogamy, and its consequence the offence (or taboo) or incest, continues to be a fundamental principle in Arabana custom and law and is reflected in the normative system.

38. The Evidence supports the opinion of the experts that the classificatory kinship system remains a key feature of contemporary Arabana custom and law. This was also apparent to the State officers who participated in the field trip. Under this system, terms (both in Aboriginal English and the Arabana language) equivalent to brother/sister, daughter/son, aunt/uncle and grandparent/grandchild are extended to include wider ranges of collateral relatives. Siblings, first cousins and second cousins in English kin terminology, for example, are all 'classified' as brother/sister in Arabana kinship terminology and are addressed as such.

39. In the opinion of the experts, the kinship classifications bring with them normative obligations and expected behaviours, such as responsibility, nurturing, discipline and teaching from the older relatives to the younger, as well as respect from the younger to the older. There was evidence of other normative behaviours predicated on kinship, including the practice of children being "brought up" by relatives (generally classificatory parents or grandparents) other than their biological parents, the obligations of a man's wife towards his (classificatory) brothers, and the view that (classificatory) sisters can share their husbands.

40. The evidence suggests that the classical system of landholding by localised groups based on patrafilial Ularaka (ie traditional stories) is no longer observed. Contemporary Arabana people consider that all of Arabana country belongs to Arabana people generally. Nevertheless, the evidence demonstrates that some individuals or families are recognised as having special knowledge of and responsibility for particular areas and their Ularaka, including related songs.

41. In the context of negotiations for a consent determination, the State could properly accept that the changes in traditional rules of succession to country that accommodate both patrifilial and matrifilial descent, and succession to the country as a whole (as distinct from particular parts of the country) have their basis in traditional law and custom. For these purposes, the State accepts that the pre-sovereignty normative society has continued to exist throughout the period since sovereignty, notwithstanding an inevitable adaptation and evolution of the laws and customs of that society.

The anthropological report also contains comprehensive information describing the complex and intricate body of traditional laws and customs that continues to be acknowledged and observed by the claim group. Given that the evidence before Finn J included the same anthropological report that is before me (and his Honour has made findings upon that evidence), I do not consider it necessary or helpful to reference here all the extensive material provided in that report. However, I refer to the following information that describes particular dreamings/dreaming sites belonging to the group that are located in the application area:

> 'Frog' was named as an Ularaka by our informants ... Hercus provides some detail on three Frog Ularaka (Hercus, nd (a):29). We quote her account of what she understands to be the "main Frog History" – based on fieldwork between the late 19060s and early 1990s – because it is consonant with information provided to us.
>
> > The main Frog History belongs to the Arabana people and starts from [traditional name], Hookey's waterhole near Oodnadatta. A tree-frog arrived there to [sic] and persuaded a large party of Waterhold Frogs to go to was [sic] with some other frogs far away to the east. They all set off and travelled down the Neales. When they were camped near Algebuckina some local people began teasing them ... In the end the Frogs got angry and turned all those people into stone and they are still there as jumbled rocks, and the Frogs are there as larger boulders. They continued down the Neales and then turned north and walked right up to the top of Mt Robinson 'the Frog-pat'. They went along Kancharana Creek to Macumba, they are still there as rows of trees by the narrow channel as it goes into the Macumba. Ultimately they sank into the ground at a large swamp near Macumba...—the anthropological report at p. 201.
>
> [Name removed] said that the Arabunna boundary finished up at Oodnadatta. [Name removed] thinks that Oodnadatta [should] really be [said in language] [traditional word for Oodnadatta]. There is a hill near Oodnadatta where the Old Men pooed [traditional word for poo]. That is an Ularaka. The Old Men travelled. Other people say that Oodnadatta is a flower. [Name removed] speaks about a waterhole near Oodnadatta. That represents the place where the Frog came out. That's also an Ularaka thing. There are big holes where the Frog goes in and out— the anthropological report at p. 204

I note again, the Court's finding that:

> A number of Ularaka, many of which have previously been recorded by earlier researchers, is in evidence. The Evidence indicates ***considerable contemporary knowledge by members of the claim group of the 'Ularaka', that the 'Ularaka' has been a feature of Arabana law and custom since a time prior to sovereignty***, and that the contemporary knowledge and practices of members of the claim group ***indicates the evolution of these traditions in a manner consistent with Arabana law and custom (emphasis added)***—reasons for judgement in the Arabana No. 1 consent determination at [50].

I note also, that there is an abundance of information before me that describes the transmission between generations, of the claim group's laws and customs. For example:

> The Arabunna people we worked with continuously spoke about occasions on which they or others had been taught by their elders. We have rarely heard Arabunna people mention instances where knowledge was passed on between peers:
>
> > I asked [name removed] if he had never been to that site before, how he knew the stories so well and how he knew about the site so well[2]. [Name removed] explained that it was the Ularaka, and that this was like a map. The old people told me the stories over and over again when I was a child. My generation we still talk about it together now. [Name removed] said that the different stories belong to the three different brothers. [Name removed] said I feel humbled and proud to be here and see this place. I have heard so much about it from my elders. [Name removed] told [name removed] that there used to be really huge ceremonies at Primrose Hill. Primrose Hill was a meeting point of a number of different stories for [name removed] family...
> >
> > [Name removed] (b. 1969) told us that it was [name removed] (b. 1935) that taught her about the yalka site and the Seven Sisters ...
> >
> > ...
> >
> > The old people [name removed] talked stories about the country, told the young people so they know whose country it is. They told them stories. [Name removed] asked if anyone told her that it was her country. [Name removed] said that her grandmother told her. Her grandmother knew that she was from that country ...—the anthropological report at p. 337.

Based on all the available material, my understanding is that the key principles of the group's body of traditional laws and customs are as follows:

- Arabana society forms part of a 'Lakes cultural grouping' with a system of laws and customs that are distinct from those of the Western Desert cultural bloc.
- Classificatory kinship and marriage, underpinned by the practice of exogamy is central to defining relationships between people, and between people and land.
- The Arabana have a distinct language comprising closely related dialects.
- Male initiation processes including the Wilyaru ceremony may no longer be practiced on country however the group still meet regularly on country for other important communal events. These events/meetings remain an important element of Arabana custom and law, providing the context in which 'proper' Arabana behaviour is practised, monitored and transmitted between generations.
- Due to the movement of people since European settlement, the classical system of landholding by localised groups based on patrafilial Ularaka is no longer observed. Contemporary Arabana people consider that all of Arabana country belongs to Arabana people generally. However, certain individuals or families are still recognised as having special knowledge of and responsibility for particular areas and their Ularaka, including related songs. There are requirements as to when and by whom, and in whose presence certain songs can be sung.

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[2] [Name removed] was born in 1932 at Finniss Springs (in the nearby surrounds of the application area). The claim group recognised [name removed] as the most senior living Arabana man and an expert on Ularaka and Arabana language—the anthropological report at p. 8. He is the grandchild of the Strangways couple identified as antecedents for the claim group in Attachment A to the application.

- There are normative rules relating to authority, including gender specific divisions of knowledge and authority.
- Transmission of knowledge is governed by rules and norms. Information is handed down from the oldest known generation, via contemporary elders, to middle-aged and young people. Knowledge is also usually, though not always, transmitted between people of the same gender. Most commonly, knowledge is transmitted from (classificatory) grandfathers to grandsons, grandmothers to granddaughters, uncles to nephews or aunties to nieces. It is important to transmit knowledge while on Arabana country.

Given that Finn J has made findings regarding the traditional laws and customs of the group (extracted above at s. 190B(5)(a) and this subcondition), in my view, his Honour's reasons are highly relevant to my consideration of the applicant's assertion under s. 190B(5)(b).

Having considered all of the available information, I am of the view that there is a sufficient factual basis demonstrating the existence of a pre-sovereignty society that acknowledged and observed a normative system of laws and customs. There is substantial information before me in support of this assertion, the most pertinent, in my view, being that the Court has determined that the Arabana hold native title over country that adjoins two relatively small areas comprising the application area. Thus, the Court has found that prior to sovereignty, there existed a normative society in relation to the Arabana No. 1 consent determination area, and, that the current claim group are the successors of that pre-sovereignty society.

I also consider that there is sufficient material to support the assertion that the claim group continue to acknowledge and observe a system of laws and customs that are rooted in the laws and customs of the pre-sovereignty society that existed in the application area. In my view, based on the available information and given my conclusions above at s. 190B(5)(a), it is open to me to draw an inference that the claim group continue to acknowledge and observe the same laws and customs as they relate to the application area, as the laws and customs that were found by the Court to be 'traditional', in relation to the Arabana No. 1 consent determination area. To that end, I note that the applicant has explained that the 'traditional laws and customs recognised in the ... [Arabana No. 1] claim are the same laws and customs that apply to this claim group and their rights to hold native title over the' application area—the application at Schedule F.

I note also, that there is material before me to support the acknowledgement and observation of laws and customs in relation to dreaming sites located in the application area, such as the details regarding the Frog and Old Men poo Ularaka (situated near Oodnadatta).

Altogether, there is much information before me that reveals the specific content of the group's traditional laws and customs. There is substantial material that describes the generational transmission of those laws and customs, as well as information explaining how the claim group continue to be governed by their laws and customs. The material also provides an explanation of how the claimants' current laws and customs are still based on the principles of their pre-sovereignty laws and customs, given that they now acknowledge and observe some laws and customs in a modified form (to the precise laws and customs of their pre-sovereignty ancestors).

I am therefore satisfied that there is a sufficient factual basis to support the assertion that there exist traditional laws acknowledged by, and customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

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).

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

Having regard to the material that I have considered above in relation to ss. 190B(5)(a) and (b), I am of the view that the information before me provides support for the assertions that:

- there was a society that existed at sovereignty that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the current claim group; and
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement—*Gudjala 2007* at [82].

As discussed above at the introduction to the overall condition of s. 190B(5), in light of the findings by Finn J in the Arabana No. 1 consent determination, I have given significant weight to his Honour's reasons in my consideration of this subsection.

Accordingly, I am satisfied that there is a sufficient factual basis to support the assertion that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

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 nature of the task at s. 190B(6)

At s. 190B(6), I must consider that, prima facie, the right or interest is established. Thus, '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'—*Doepel* at [135].

The test is said to involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132].

In undertaking the task at s. 190B(6), I must have regard to the relevant law as to what is a native title right and interest, specifically the definition of native title rights and interests contained in s. 223(1) of the Act. That is, I must examine each individual right and interest claimed in the application to determine whether I consider that, prima facie, they:

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

The 'critical threshold question' for recognition of a native title right or interest under the Act is whether it is a right or interest 'in relation to land or waters'—*Western Australia v Ward* [2002] HCA 28 (*Ward HC*), Kirby J at [577].

I do not intend to examine this 'threshold question' separately in respect to each native title right and interest claimed. Having examined each of the rights and interests set out in Schedule E, it is my view that, prima facie, each is a right or interest 'in relation to land or waters'.

Regarding the other requirements for native title rights and interests, the High Court stated the following in *Yorta Yorta* (referring primarily to s. 223(1)(c) but alluding to the requirements of s. 223(1)(a)):

> Native title owes its existence and incidents to traditional laws and customs, not the common law. The role of the common law is limited to the recognition and protection of native title. That recognition and protection depends on native title not having been extinguished and its not having incidents that are repugnant to the common laws... requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom—at [110].

Can the native title rights and interests claimed in the application be prima facie established?

At Schedule E, the following native title rights and interests are claimed:

1. The nature and extent of the native title rights claimed and interests in relation to the claim area are non-exclusive rights to use and enjoy in accordance with the native title holders' traditional laws and customs the land and waters of the Claim Area, being:
   (a) the right to access and move about the Claim Area;
   (b) the right to live, to camp and, for the purpose of exercising their native title rights and interests, to erect shelters and other structures on the Claim Area;
   (c) the right to hunt and fish on the land and waters of the Claim Area;
   (d) the right to gather and use the natural resources of the Claim Area such as food, medicinal plants, wild tobacco, timber, resin, ochre and feathers, but excluding those resources referred to in Paragraph 12;
   (e) the right to share and exchange the subsistence and other traditional resources of the Claim Area;
   (f) the right to use the natural water resources of the Claim Area;
   (g) the right to cook on the Claim Area and to light fires for domestic purposes but not for the clearance of vegetation;
   (h) the right to engage and participate in cultural activities on the Claim Area including those relating to births and deaths;
   (i) the right to conduct ceremonies and hold meetings on the Claim Area;
   (j) the right to teach on the Claim Area the physical and spiritual attributes of locations and sites within the Claim Area;
   (k) the right to visit, maintain and protect sites and places of cultural and religious significance to native title holders under their traditional laws and customs on the Claim Area; and
   (l) the right to be accompanied on to the Claim Area by those people who, though not native title holders, are:

(i) spouses of native title holders, or
(ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Claim Area or;
(iii) people who have rights in relation to the Claim Area according to the traditional laws and customs acknowledged by the native title holders.

The below native title rights and interests were found to exist in the Arabana No. 1 consent determination and are set out in the determination orders as follows:

> ... the nature and extent of the native title rights and interests of the Arabana People in relation to the Determination Area are non-exclusive rights to use and enjoy in accordance with their traditional laws and customs the land and waters of the Determination Area, being:
>
> a. the right to access and move about the Determination Area;
> b. the right to live, to camp and, for the purpose of exercising their native title rights and interests, to erect shelters and other structures on the Determination Area;
> c. the right to hunt and fish on the land and waters of the Determination Area;
> d. the right to gather and use the natural resources of the Determination Area such as food, medicinal plants, wild tobacco, timber, resin, ochre and feathers, but excluding those resources referred to in Paragraph 12;
> e. the right to share and exchange the subsistence and other traditional resources of the Determination Area;
> f. the right to use the natural water resources of the Determination Area;
> g. the right to cook on the Determination Area and to light fires for domestic purposes but not for the clearance of vegetation;
> h. the right to engage and participate in cultural activities on the Determination Area including those relating to births and deaths;
> i. the right to conduct ceremonies and hold meetings on the Determination Area;
> j. the right to teach on the Determination Area the physical and spiritual attributes of locations and sites within the Determination Area;
> k. the right to visit, maintain and protect sites and places of cultural and religious significance to Native Title Holders under their traditional laws and customs on the Determination Area; and
> l. the right to be accompanied on to the Determination Area by those people who, though not Native Title Holders, are:
>
> i. spouses of native title holders; or
> ii. people required by traditional law and custom for the performance of ceremonies or cultural activities on the Determination Area; or
> iii. people who have rights in relation to the Determination Area according to the traditional laws and customs acknowledged by the native title holders—at [6].

Finn J has made findings (upon evidence that includes the anthropological report before me) in relation to the group's determined native title rights and interests. Thus, in my view, it is appropriate that I examine his Honour's reasons as part of the applicant's factual basis for the purpose of s. 190B(6).

I note that, with regard to the native title rights and interests the subject of the Arabana No. 1 determination, the orders proposed were made by consent. In his reasons, Finn J references the extensive historical, anthropological and genealogical evidence provided in support of the application—reasons for judgment in Arabana No. 1 consent determination at [12] to [21].

Finn J also sets out that:

52. These rights are consistent with rights recognised by the Federal Court elsewhere in South Australia. The rights and interests recognised are consistent with the traditional rights and interests that would have been observed previously.

53. The Evidence shows that a significant number of Arabana people continue to have a physical connection with the determination area and regularly access the area for traditional purposes. A number of contemporary Arabana claimants continue to live on the claim area, including in Marree, at Finniss Springs, and on a number of the pastoral stations, including Macumba, Nilpinna, Anna Creek, and Stuart Creek. A number of contemporary claimants were born or raised on the claim area and have lived on the claim area for periods of their life. Others have worked across the claim area. A number of the ancestors of contemporary claimants are buried on the claim area.

54. The Evidence shows that contemporary Arabana people continue to have a detailed knowledge of the claim area, its water sources, flora and fauna, and cultural geography.

55. Whilst the need for bush tucker has diminished, there is evidence that a number of claimants continue to access the resources of the claim area for flora and fauna, wood and water. Arabana people continue to hunt on the claim area, including for kangaroos, bush turkey, rabbit and lizards, including perente, kadni and kalta. There is also evidence that Arabana people continue to have knowledge of bush tucker and bush medicine, which is transmitted to younger generations. This includes knowledge of where and when to find resources such as yalka, edible berries, milky bush, bush tomato, bush cucumber, and bush potato.

56. Whilst Wilyaru and other ceremonies no longer occur on Arabana land, Evidence shows that Arabana people still meet regularly on country for important communal events such as annual reunions, funerals and special birthdays, as well as rodeos, races and bronco brandings. In the opinion of the experts, these communal gatherings remain an important element of Arabana custom and law and provide an important context in which 'proper' Arabana behaviour is practised, monitored and transmitted between generations. It provides a forum in which membership of Arabana society is activated, maintained and policed.

57. Evidence was presented of the transmission of knowledge from Arabana people in the oldest known generation, via contemporary elders, to middle-aged and young Arabana people. Evidence was given about rules or norms which govern the transmission of knowledge, including that knowledge is passed from elders to younger members of the group and that knowledge is usually, though not always, transmitted between people of the same gender. Most commonly, knowledge is transmitted from (classificatory) grandfathers to grandsons, grandmothers to granddaughters, uncles to nephews or aunties to nieces. Evidence was also presented of the importance of transmitting knowledge while on Arabana country.

58. Evidence was given of the importance to Arabana people of protecting their country, in particular, the preservation of their mound springs and other water sources, which are both critical natural resources and the loci of many Ularaka. Arabana people have sought over a number of years to have areas and places of significance entered on the heritage register under the *Aboriginal Heritage Act 1988* (SA) and there are a large number of recorded sites across the claim area.

In my view, given the location and size of the application area, I consider the two portions comprising the application area to be small extensions of the group's previously claimed country, being an area over which they now hold a determination of native title. To that end, as I have earlier noted, it is explained in the application that the portion of the application area comprising Oodnadatta and its surrounds was previously included in the Arabana No. 1 application—at Schedule F.

As I have stated in my conclusions for s. 190B(5), there is much information available to satisfy me that there is a sufficient factual basis in support of the claim group's asserted association with the application area, and the existence of traditional laws and customs in relation to the application area that give rise to the claimed native title rights and interests. In this regard, despite that the bulk of the factual basis material provided by the applicant (the anthropological report) refers to the Arabana No. 1 application, I consider that the material is also relevant to the application before me. I note again, that the anthropological report makes reference to places situated in the application area, and that the applicant has explained that the same traditional laws and customs recognised in Arabana No. 1 are the same laws and customs that apply to the application before me—at Schedule F.

Nevertheless, the fact that the claim group are the native title holders of a relatively large area adjoining the application area, should, in my view, be given significant weight in my consideration of whether the claimed native title rights and interests in the application can be prima facie established. As extracted above, the native title rights and interests found to exist in the Arabana No. 1 consent determination are the same rights and interests claimed in the application before me.

The standard applied to a determination of native title (and to the existence of each native title right and interest) is of a much more onerous one than that imposed by s. 190B(6). Thus, I consider that I may rely upon the reasons and findings of Finn J in the Arabana No. 1 consent determination (as referenced above), in forming the view that all of the native title rights and interests are prima facie established **except for the claimed 'right to hunt and fish on the land and waters of the Claim Area'**—Schedule E at [(c)].

On 11 May 2012, the Full Court of the Supreme Court of South Australia found that the native title right to fish in South Australia had been validly extinguished—*Dietman v Karpany and Anor* [2012] SASCFC 53 *(Dietman)*.

The facts of the *Dietman* case involved two Aboriginal men found in possession of 24 undersized abalone, an offence under 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'—*Dietman* at [13]. The Full Court allowed the appeal, finding that the relevant prohibitive provision in the preceding legislation (the *Fisheries Act 1971* (SA)) had validly extinguished any native title right to fish that the said Aboriginal group possessed prior to the enactment of that statute—*Dietman* at [35] to [37].

Since the decision was handed down in May 2012, I am aware that an appeal to the High Court has been made by the Narrunga people, and is expected to be heard later 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 I have set out above, my task at s. 190B(6) requires that my consideration of each of the native title rights and interests claimed 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'.

Having regard to the decision in *Dietman*, it is my understanding that the Full Court of the Supreme Court was conclusive in finding that *all* native title rights to fish, across the entirety of the State of South Australia, were validly extinguished. It follows then, that 'the right to hunt and fish on the land and waters of the Claim Area' claimed by the applicant cannot be recognised by the common law, and that therefore 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).

I note that, there is nothing before me to indicate that the specific right to 'hunt' in the application area is extinguished. However, the Registrar can only enter on the Register those rights and interests claimed in an application that are prima facie established. The Registrar can also only enter those relevant rights and interests on the Register in the form that they are described in the application. Therefore, given that the right claimed in Schedule E at paragraph (c) is framed as 'the right to hunt and fish on the land and waters ...', in my view, that overall claimed right is unable to be prima facie established and therefore cannot be entered on the Register.

For the reasons above, it is my view that, prima facie, all of the native title rights and interests claimed in the application **subject to the 'right to hunt and fish on the land and waters of the Claim Area'** (in Schedule E at [(c)]) can be established. Section 190B(6) is met.

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).

This section requires that the evidentiary material be capable of satisfying the Registrar of a particular fact(s), specifically that at least one member of the claim group 'has or had a traditional physical connection' with any part of the application area. While the focus is necessarily confined, as it is not commensurate with that of the Court in making a determination, it 'is upon the

relationship of at least one member of the native title claim group with some part of the claim area'—*Doepel* at [18].

I also understand that the term 'traditional,' as used in this context, should be interpreted in accordance with the approach taken in *Yorta Yorta—Gudjala 2007* at [89]. In interpreting connection in the 'traditional' sense as required by s. 223 of the Act, the members of the joint judgment in *Yorta Yorta* stated that:

> [T]he connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty—at [86].

In my view, there are many examples within the material before me that demonstrate the required traditional physical connection of at least one member of the native title claim group. For instance, in coming to this view, I have had regard to the following information in the application:

> (h) The traditional laws and customs recognised in the Arabana Peoples Native Title Claim are the same laws and customs that apply to this claim group and their rights to hold native title over the claimed land—Schedule F.
>
> Members of the native title claim group currently have (and continuously had) a traditional physical connection with the claim area or parts of it ... Other members of the claim group also frequently visit the area. They attend to cultural responsibilities and are involved in protecting their heritage and significant sites in the claim area. They attend meetings in the claim area, go camping and hunting, and enjoy sharing their heritage with their children, grandchildren and others ... Members of the claim group maintain their connection in the area, and use and enjoy the area as indicated above because it is their ancestral land. They do so in accordance with the traditional laws and customs as taught to them by their Elders. In particular, three of the Named Applicants, Aaron Stuart, Desmond Dodd and Greg Warren have live [sic] for many years in and around the claimed area near Oodnadatta. They have undertaken the above activities with the ancestors and/or their descendants, as have many other members of the claim group. Members of the claim group have lived all or most of their lives in Oodnadatta, including [seven claimants' names] and have also carried out the above activities ... Further information in relation to the traditional physical connection will be provided to the Registrar by way of the Table of Experts Opinions and Supporting Evidence...—Schedule M.

At Schedule M, the applicant refers to further information contained in the anthropological report in relation to its asserted traditional physical connection. Thus, I have read the information provided in the application together with the material contained in the anthropological report, in forming my views regarding the sufficiency of the application to meet s. 190B(7).

The following details, in my view, provide an example of how particular traditional laws and customs are acknowledged and observed by members of the claim group, in carrying out activities in the application area such as those referred to above in Schedule M of the application:

> ... [Name removed] continues the story and indicates who told him the story and the moral behind the story. [Name removed] describes the hunter returning home and giving the old lady a "little finch and top knot pigeon". The old women saw that he was greasy. The old man told her that he was going to lie down in the creek. [Name removed] then sang in language the old women's song which caused him to roll around screaming in pain. The old people

approached the old man but as they did, his [traditional word] exploded killing those people and they are now represented by the round stones in the Margaret River. [Names removed] told us that story".

Only two people not killed, one old lady [name removed] and the girl leading her. They are represented by the tea trees [name removed] pointed out.

Those old stories have a moral behind them. When you go out hunting you have to share. [Name removed] describes coming with his family to this place. [Name removed] asked who he came with? He said with his "Nanu" there (referring to [name removed]). "It was not your immediate parents who told you stories – it was your aunties and uncles". I used to bring my kids out here when they were little"...

...'The area is called [traditional name]. But the spring is called [traditional name] ... All Arabunna would sing it ... [name removed] sang the song when she was here ... in Arabunna ...—the anthropological report at pp. 222 and 223.

On the basis of the material before me, I am satisfied that the condition in s. 190B(7) is met.

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

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

Section 61A provides:

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

(2) If:

(a) a previous exclusive possession act (see s. 23B) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth; or

(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s. 23E in relation to the act;

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

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done in relation to an area; and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

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

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

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

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

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

In my view the application **does not** offend the provisions of s. 61A(1).

The geospatial assessment confirms that no determinations fall within 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).

Attachment B(2) makes clear that the application excludes any areas in relation to which a previous exclusive possession act was done—at [(2)]. At paragraph (4) of Attachment B(2), it is stated that the application does include any area to which ss. 47 to 47B applies.

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).

The application does not claim any native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others, as identified in Schedule E.

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).

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

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

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

The application does not cover any offshore place, as confirmed in Schedule P.

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

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

At Attachment B(2), it is stated that the application area excludes any areas in relation to which the native title rights and interests have otherwise been wholly extinguished, subject to where ss. 47 to 47B is applicable.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Arabana No. 2**
NNTT file no.	**SC2013/001**
Federal Court of Australia file no.	**SAD38/2013**
Date of registration test decision	**10 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]