National Native Title Tribunal

Registration test decision

Application name	Kokatha Native Title Claim
Name of applicant	Andrew Starkey and Joyleen Thomas
NNTT file no.	SC2014/002
Federal Court of Australia file no.	SAD90/2009
Date application made	18 June 2009

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

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

Date of decision: 17 November 2014

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Jessica Di Blasio

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 8 August 2014 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

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

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

Application overview and background

[3] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Kokatha native title claim to the Registrar on 8 August 2014 pursuant to s 64(4) of the Act. This claim is a combination of the Kokatha Uwankara native title claim (SC2009/001; SAD90/2009) and Kokatha Uwankara No. 2 (SC2012/003; SAD270/2012). These two claims were combined by order of the Court on 8 August 2014. Receipt of the amended combined application has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[4] I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply as the nature of the amendments, being a combination of two previously separate applications are not envisaged by the circumstances in either ss 190A(1A) or 190A(6A).

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

[6] I note that part A of the claim area, being the majority of the area the subject of the combined amended application was determined by consent on 1 September 2014. The remaining part B, being the area of the application that falls over Lake Torrens remains undetermined.

Registration test

[7] 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.

[8] Pursuant to s 190A(6), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss 190B and 190C.

Information considered when making the decision

[9] 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.

[10] 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.

[11] I have had regard to the following documents in my consideration of the application for the purposes of the registration test:

- Form 1 and all attachments; and
- updated certification dated 6 November 2014.

[12] 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 of the Act.

[13] Also, I have not considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

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

[15] The case manager with carriage of this matter wrote to both the applicant and the State of South Australia (the State) on 1 October 2014 providing a timeframe for registration testing as well a timeframe for any submissions they may wish to make in relation to the application of the registration test.

[16] On 20 October 2014 the State confirmed that it did not wish to make any submissions in relation to the application of the registration test over Part B of the amended application. At the date of making this decision no submissions have been received from the State.

[17] On 6 November 2014 South Australian Native Title Services Ltd (SANTS) provided an updated copy of the certification attached to the application. This certificate included a corrected date and is signed by the Acting Chief Executive Officer. A copy of the updated certification was provided to the State, and it was afforded the opportunity to make submissions in relation to this document. On 14 November 2014, by phone, the State confirmed that it did not wish to make any submissions in relation to the updated certification document (see file note of phone conversation on registration file).

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.

[18] 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.

[19] In reaching my decision for the condition in s 190C(2), I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s 190C(2)— *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112 (Doepel) at [16] and also at [35]–[39]. In other words, does the application contain the prescribed details and other information?

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

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

Native title claim group: s 61(1)

[22] In *Doepel*, Mansfield J confined the nature of the consideration for this requirement to the information contained in the application—at [37] and [39]. I therefore understand that I should consider only the information contained in the application and should not undertake any form of merit assessment of the material when considering whether I am satisfied that 'the native title claim group as described is in reality the correct native title claim group'—*Doepel* at [37].

[23] If the description of the native title claim group in the application were to indicate that not all persons in the native title group were included, or that it is in fact a subgroup of the native title claim group, then in my view, the relevant requirement of s 190C(2) would not be met and the claim could not be accepted for registration—*Doepel* at [36].

[24] There is a description of the claim group included at Schedule A of the application.

[25] There is nothing on the face of the application which suggests that the application is not brought on behalf of all members of the native title claim group, I am therefore satisfied that the native title claim group as described in Schedule A meets the requirements of s 61(1).

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

Name and address for service: s 61(3)

[27] The applicant's name and address for service is included in the application at Part B.

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

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

[29] I understand that this provision is 'a matter of procedure' and does not require me to consider whether the description is 'sufficiently clear', merely that one is in fact provided—*Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 *(Gudjala 2007)* at [31] and [32]. I am not required or permitted to be satisfied about the correctness of the information in the application naming or describing the native title claim group—*Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198—at [34].

[30] The native title claim group is described at Schedule A of the application.

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

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

[32] The application is accompanied by two affidavits each affirmed by one of the people who comprise the applicant.

[33] Each of the affidavits include the statements required by s 62(1)(a)(i)–(v) and is competently signed and witnessed

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

Details required by s 62(1)(b)

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

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

[36] Attachment B of the application is a metes and bounds description of the area covered by the application. Attachment B1 of the application includes details about areas excluded from the application

[37] The application includes all details and other information required by s 62(2)(a)

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

[38] Attachment C of the application includes a map of the area covered by the application.

[39] The application includes all details and other information required by s 62(2)(b).

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

[40] Attachment D of the application includes details of land tenure searches conducted over the area.

[41] The application includes all details and other information required by s 62(2)(c).

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

[42] The native title rights and interests claimed in the application area are included at Attachment E of the application.

[43] The application includes all details and other information required by s 62(2)(d).

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

[44] Information relevant to the asserted factual basis for the claim in the application is contained at Attachment F of the application. I am of the view that I need only consider whether the information regarding the claimants' factual basis addresses in a general sense the requirements of s 62(2)(e)(i)–(iii). I understand that any 'genuine assessment' of the sufficiency of the factual basis is to be undertaken by the Registrar when assessing the application for the purposes of s 190B(5), and I am of the view that this approach is supported by the Court's findings in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [92].

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

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

[46] Schedule G of the application lists activities currently carried out by the claim group in relation to the land and waters of the application area.

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

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

[48] Schedule H of the application states '[t]here are no overlapping applications covering any of the areas claimed in this application other than Part B of this proceeding known as the Lake Torrens Area which is overlapped by the Adnyamathanha No. 5 Native Title Determination Application SAD 277/2012'.

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

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

[50] Schedule HA of the application states 'not applicable', which I take to mean that the applicant is not aware of any s 24MD(6B)(c) notices that have been given over any of the application area.

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

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

[52] Attachment I of the application includes details of s 29 notices that have been given in relation to the application area of which the applicant is aware.

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

Conclusion

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

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s 190A.

[55] This requirement is concerned to ensure that the Registrar is satisfied that no person included in the native title claim group for the current application is a member of the native title claim group for any previous application.

[56] I understand that this requirement only arises if the conditions specified in subsections (a), (b) and (c) are all satisfied— *State of Western Australia v Strickland* [2000] FCA 652. I therefore

must first consider if there are any previous claims that overlap the application area, that were on the Register when the current application was made, and that remain on the register at the date of this decision. If there is no such claim, then there will be no 'previous overlapping application' for the purposes of this requirement.

[57] The Tribunal's Geospatial services prepared an overlap analysis dated 25 August 2014 which identifies three applications which overlap the current application area, being the two pre-combination Kokatha Uwankara and Kokatha Uwankara No. 2 native title claims and the Adnyamathanha #5 native title claim.

[58] It is my view that neither the Kokatha Uwankara or Kokatha Uwankara No. 2 applications constitute 'previous overlapping applications' for the purposes of s 190C(3) as they are both the pre-combination applications that comprise the current combined application that I am considering.

[59] I also note that the Geospatial assessment further indicates that the Adnyamathanha #5 native title claim is on the Schedule of native title claims only. That is, the Adnyamathanha #5 native title claim is not a registered claim.

[60] As the only overlapping application (the Adnyamathanha #5 native title claim) is not registered, it is my view that there is no 'previous application' for the purposes of s 190C(3).

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

Subsection 190C(4)
Authorisation/certification

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

[62] 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.

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

[64] Attachment R of the application includes a certification from SANTS. I note however that this certificate is not signed and although referring to events which took place in 2014, is dated 17 June 2009. I understand that this copy of the certification was filed in error. SANTS have since provided, directly to the Registrar, an updated copy of the certification. The updated certificate is dated 6 November 2014 and is signed by the Acting Chief Executive Officer. It is this updated certification that I have considered against the requirement at s 190C(4).

[65] I have had regard to the Geospatial assessment dated 25 August 2014 which identifies SANTS as the only representative body responsible for the area covered by the application. SANTS is therefore the only body that could certify the application.

[66] Section 203BE(4) sets out particular statements that must be included in a certification for a native title determination application. Namely that the representative body must be of the opinion that the requirements of ss 203BE(2)(a) and (b) have been met, their reasons for being of that opinion, and where applicable set out what the body has done to meet the requirements of s 203BE(3). The necessary opinions at ss 203BE(2)(a) and (b) relate to authorisation of the claim by members of the native title claim group and that 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.

Section 203BE(4)(a)

[67] This provision requires a statement from the representative body that they are of the opinion that the requirements set out in s 203BE(2)(a) and (b) have been met.

[68] The certificate contains the required statements.

Section 203BE(4)(b)

[69] This provision requires the representative body to set out their reasons for being of the opinion required at s 203BE(4)(a).

[70] The certificate provides the following relevant information which briefly details SANTS' reasons for being of this opinion:

- SANTS has worked extensively with both pre-combination native title claim groups and previously certified the authorisation of the two pre-combination applications.
- A meeting of the native title claim group was held on Friday 1 August and Saturday 2 August 2014 at Standpipe hotel in Port Augusta. The meeting was well attended by approximately 120 claim group members.

- Notification of the meeting was sent to all members of both pre-combination applications. Relevantly the notice stated that the purpose of the meeting was 'to authorise the applicants to combine and continue Kokatha Uwankara No. 2 claim into the Kokatha Uwankara native title claim.'

- Notice of the authorisation meeting was also sent to local community based organisations including the Aboriginal Legal Rights Movement in Port Augusta, the Aboriginal Health Unit of Port Augusta and the Davenport Community of Port Augusta. The notice also appeared in the Whyalla News and in the Port Augusta Transcontinental.

- The native title claim group passed the following resolution at the authorisation meeting:

> Those persons present at the meeting:
>
> (a) agree that the ancestors are properly represented through the family groups in attendance at this meeting. This meeting can make binding decisions about matters arising in relation to the native title claims;
>
> (b) agree that the process that must be followed in relation to authorisation of the Applicants to combine the Kokatha Uwankara and Kokatha Uwankara No. 2 claim is based on traditional laws and customs and involves consultation with senior elders present before any decision is made. After this process has occurred, those present at the meeting will make the decision based on a majority vote;
>
> (c) acknowledge that the process referred to above has been followed and that the elders have been consulted;
>
> (d) confirm that the Applicants:
>
> > i. in respect of the Kokatha Uwankara application, are authorised to amend the application to facilitate its combination with the Kokatha Uwankara No. 2 application;
> >
> > ii. in respect of the Kokatha Uwankara No. 2 application, are authorised to combine and continue the application into the Kokatha Uwankara application which will be the lead application; and
> >
> > iii. are authorised to change the name of the Application from Kokatha Uwankara Native Title Claimants to Kokatha.
> >
> > iv. Andrew Starkey and Joyleen Thomas are authorised to act jointly as the Applicant for the combined Kokatha Uwankara native title application and to deal with all matters arising in relation to it.

[71] The certificate contains the required information pursuant to s 203BE(4)(b).

Section 203BE(4)(c)

[72] This provision requires that, where applicable, the representative body briefly set out what it has done to meet the requirements of s 203BE(3), namely that the representative body make all reasonable efforts to reach agreement between any overlapping claimant groups and to minimise the number of overlapping applications in relation to the application area. Section 203BE(3) further provides that a failure to comply with this subsection does not invalidate any certification of the application by a representative body.

[73] The certification states that 'SANTS notes that the area covered by the Kokatha Uwankara native title determination application known as "the Lake Torrens Area" was by order of the Federal Court on 5 April 2013 excised from the proceedings to be dealt with in separate proceedings. Accordingly, section 203BE(3) is not a relevant consideration in this matter.'

[74] I note that only Part B, the Lake Torrens Area, remains undetermined following the Court's determination on 1 September 2014. It may be however, that given the Court is dealing with the Lake Torrens area in separate proceedings as a result of the overlap there are no further reasonable steps SANTS could take to minimise the occurrence of overlap or reach agreement about the area between the overlapping groups. Regardless, as mentioned above, a failure to comply with this subsection does not invalidate a certification.

[75] In my view the certification meets the requirement of s 203BE(4)(c).

Conclusion

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

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.

[77] A description of the application area is included at Attachment B of the application.

[78] Attachment B contains a metes and bounds description entitled 'Kokatha – Uwankara Native Title Determination Application', prepared by Geospatial services, dated 30 June 2014 and makes reference to:

- surrounding native title determinations and applications;
- cadastral boundaries
- topographic feature boundaries;
- geographic coordinates to six decimal degrees; and
- notes relating to the source, currency and datum of data used to prepare the description.

[79] Attachment B1 of the application is entitled 'areas not covered by the application' and lists general exclusions from the application area.

[80] Attachment C of the application is a colour copy of an A3 map entitled 'Kokatha Uwankara Native Title Determination Application', prepared by Geospatial services and dated 30 June 2014 and includes:

- the application area depicted by a bold blue outline and labeled;
- surrounding native title determinations and applications labeled;
- cadastral boundaries colour coded and labeled;
- localities, topographic features and roads shown and labeled;
- scalebar, northpoint, coordinate grid, location diagram and legend; and
- notes relating to the source, currency and datum of data used to prepare the map.

[81] Section 190B(2) requires that the information provided in the boundary description and map be sufficient for the Registrar to be satisfied that it can be said with reasonable certainty whether the native title rights and interests are claimed in the particular land and waters covered by the application. That is, the written description and map should be sufficiently clear and consistent.

[82] I have had regard to the Geospatial assessment provided by the Tribunal's Geospatial Services on 25 August 2014. The Geospatial assessment concludes that the description and map are consistent and identify the application area with reasonable certainty. Having also considered the map and boundary description contained in the application, I agree with that conclusion.

[83] I note that the Geospatial assessment and map and description of the application area are based on the combined application area prior to the consent determination over Part A being made on 1 September 2014. Only the undetermined portion of the application, over the Lake Torrens area remains. It is my view that my consideration of this requirement is concerned with the map and description included with the application, being the whole combined area.

[84] Given the above, I am satisfied that the information and map 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.

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

Subsection 190B(3)
Identification of the native title claim group

The Registrar must be satisfied that:
(a) the persons in the native title claim group are named in the application, or
(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[86] The application contains a description of the native title claim group. Thus, I must consider whether 'the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.'

Description of the native title claim group

[87] The native title claim group is described as follows:

The native title claimants are those Aboriginal people who:

(a) are the following named individuals (where living) and their biological descendants:

i) Alma Allen;

ii) Arthur Baker;

iii) Hilda Captain;

iv) Susie Captain[;]

v) Andrew Davis;

vi) Percy Davis;

vii) Stanley Davis

viii) Ted Egan;

ix) Micky Fatt;

x) Gladys Kite;

xi) Ted Larkins;

xii) Mick Reid;

xii) George Reid;

xiv) William Smith[;]

xv) Dick Thomas;

xvi) Edie Thomas;

xvii) George Turner;

xviii) Wild Mary;

xix) [name deleted]; and

(b) are included as native title claimants because of their spiritual connection to and responsibility for specific sites in the determination area, being:

(i) Lee Brady;

(ii) Tony Clark; and

(iii) Mark McKenzie.

The requirements of s 190B(3)(b)

[88] The nature of the task at s 190B(3)(b) is for the Registrar to focus upon the adequacy of the description to facilitate the identification of the members of the native title claim group, rather than upon its correctness—*Doepel* at [37] and [51].

[89] It may be that determining whether any particular person is a member of the native title claim group will require 'some factual inquiry' however 'that does not mean that the group has not been described sufficiently.'—see *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67] *(WA v NTR).*

[90] In *WA v NTR*, Carr J found that a claim group description which described the group according to descent from, or adoption by, identified ancestors and their descendants was sufficiently clear to satisfy the condition of s 190B(3)(b). Carr J found that it was possible to begin with a particular person, and then through factual inquiry, determine whether that person fell within one of the criteria identified in the description—at [67]. For the same reasons I am satisfied that the criteria for membership to the native title claim group, which, as described above, requires one to either be one of the named people or their descendant, is sufficient for the purposes of s 190B(3)(b).

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

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

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

[92] Mansfield J, in *Doepel*, stated that it is a matter for the Registrar to exercise 'judgment upon the expression of the native title rights and interests claimed'. His Honour considered that it was open to the decision-maker to find, with reference to s 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests—at [99] and [123].

[93] Primarily the test is one of 'identifiability', that is, 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99].

[94] The following list of native title rights and interests claimed in the application area is included at Attachment E:

> 1) over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply), members of the native title claim group claim the right to possess, occupy, use and enjoy the lands

and waters of the application area as against the whole world, pursuant to their traditional laws and customs.

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

(a) The right to access and move about the application area;

(b) The right to hunt on the application area;

(c) The right to fish on the application area;

(d) The right to gather and use the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone and resin;

(e) The right to use the natural water resources on the application area

(f) The right to live, to camp and to erect shelters on the application area;

(g) The right to cook on the application area and to light fires for all purposes other than the clearance of vegetation;

(h) The right to share or exchange subsistence or other traditional resources obtained from the application area;

(i) The right to engage and participate in cultural activities on the application area including those relating to births and deaths;

(j) The right to conduct ceremonies and to hold meetings on the application area;

(k) The right to teach on the application area the physical and spiritual attributes of locations and sites within the application area;

(l) The right to maintain and protect sites and places of significance under traditional laws and customs on the application area;

(m) The right to maintain, conserve and/or protect significant ceremonies, artworks, songs cycles, narrative, beliefs or practices by preventing (by all reasonable lawful means) any activity occurring on the application area which may desecrate, damage, disturb or interfere with any such ceremony, artwork, song cycle, narrative, belief or practice;

(n) The right to prevent (by all reasonable lawful means) any use or activity within the area which under traditional laws and customs is unauthorized or inappropriate in relation to significant locations, sites or objects within the area or ceremonies, artworks, song cycles, narrative, beliefs or practices carried out within the area;

(o) The right to be accompanied on to the application area by those people who, though not members of the native title claim group are:

(i) Spouses of members of the native title claim group,

(ii) People required by traditional law and custom for the performance of ceremonies or cultural activities on the application area; or

(iii) People required by members of the native title claim group to assist in, observe, or record traditional activities on the application area.

3) the rights described in paragraphs 2(b), (c), (d), (e), (f) and (i) are traditional rights exercised in order to satisfy personal, domestic and communal needs.

4) the native title rights and interests are subject to:

a) the valid laws of the State of South Australia and the Commonwealth of Australia; and

b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of South Australia.

[95] It is my view that the native title rights and interests as described above are understandable and have meaning. I am satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

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

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

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

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

(b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and

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

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

The nature of the task at s 190B(5)

[98] The nature of the Registrar's task at s 190B(5) was the subject of consideration by Mansfield J in *Doepel*. It is to 'address the quality of the asserted factual basis' but 'not to test whether the

asserted facts will or may be proved at the hearing, or assess the strength of the evidence...' I am to assume that what is asserted is true and then consider whether 'the asserted facts can support the claimed conclusions'—*Doepel* at [17].

[99] The Full Court in *Gudjala FC* agreed with Mansfield J's characterisation of the task at s 190B(5). The Full Court also said that a 'general description' of the factual basis as required by s 62(2)(e), provided it is 'in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and [is] something more than assertions at a high level of generality', could, when read together with the applicant's affidavits swearing to the truth of the matters in the application, satisfy the Registrar for the purpose of s 190B(5)—at [83]–[85] and [90]–[92].

[100] The above authorities establish clear principles by which the Registrar should be guided when assessing the sufficiency of a claimants' factual basis:

- the applicant is not required 'to provide anything more than a general description of the factual basis'—*Gudjala FC* at [92];
- the nature of the material provided need not be of the type that would prove the asserted facts—*Doepel* at [47]; and
- the Registrar is to assume the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests—*Doepel* at [17].

[101] It is, however, important that the Registrar consider whether each particularised assertion outlined in s 190B(5)(a), (b) and (c), is supported by the claimant's factual basis material. Dowsett J in *Gudjala* [2007] and *Gudjala People #2* [2009] FCA 1572 (*Gudjala [2009]*) gave specific content to each of the elements of the test at s 190B(5)(a)–(c). The Full Court in *Gudjala FC*, did not criticise generally the approach taken by Dowsett J in relation to each of these elements in *Gudjala [2007]*[1], including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009].*

[102] In line with these authorities it is, in my view, fundamental to the test at s 190B(5) that the claim provide a description of the basis upon which the claimed native title rights and interests are alleged to exist. More specifically, this was held to be a reference to rights vested in the claim group and further that 'it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)'—*Gudjala [2007]* at [39].

[103] The following information is relevant to my consideration of this requirement:

[1] See *Gudjala FC* [90] to [96]

- Attachment F; and
- Attachment G.

Reasons for s 190B(5)(a)

[104] Dowsett J observed in *Gudjala [2007]* (not criticised by the Full Court on appeal), with respect to this aspect of the factual basis, that the applicant must demonstrate:

- that the claim group as a whole presently has an association with the area, though not all members must at all times;
- that there has been an association between the predecessors of the whole group and the area over the period since sovereignty—at [52]; and
- that there is information which supports that the claim group is associated with the 'area as a whole'—*Gudjala [2009]* at [67].

[105] I also note that broad statements about association with the application area that do not provide geographic particularity may not provide the requisite factual basis for this section—*Martin v Native Title Registrar [2001]* FCA 16 at [26].

The applicant's factual basis material

[106] Attachment F of the application provides information about the native title claim group's association with the application area and details how the rights and interests that the native title claim group possess arise according to the traditional laws and customs, in particular the spiritual beliefs, of the claim group.

[107] Relevantly, Attachment F states that members of the native title claim group are direct descendants of those Aboriginal people in occupation of the application area at sovereignty. It asserts that they have remained in occupation of the area since sovereignty, and it is as a result of the traditional laws and customs of the Western Desert cultural bloc, that the claim group's rights and interests arise. It is asserted that it is these traditional laws and customs of the Western Desert cultural bloc which the claim group continue to acknowledge and observe in the application area today. Attachment F states:

> The native title claimants identify mostly as Kokatha or Barngarla, some identify as Kuyani, and they are the direct descendants of those Aboriginal persons who were in occupation of the application area, and areas surrounding the application area, at sovereignty. Descendants of those persons have remained in occupation and have used the application area, under the traditional laws and customs of the Western Desert cultural bloc, which they continue to acknowledge and observe—at [2].

[108] Attachment F provides detailed information about each of the persons listed at Attachment A, used to describe the native title claim group. This information includes the birth place and where possible birth date, information about locations they have lived and worked across the application area, as well as information concerning their marriage and details of the birth of their children and grand children.

[109] By way of example the detail provided about ancestor Arthur Baker is as follows:

> 1. Arthur Baker (Attachment A (a) (ii))
>
> 3. Hercus (1997:44) says Arthur Baker 'was a Kukata man born about 1890' who 'lived for most of his life around Conndambo (adjacent to the Application area). She says he 'was a person of very special significance and commanded an enormous respect'. Arthur was at Bon Bon (western margin of the Application area) in 1914. His son, Arthur Jnr. was at Coondambo in the 1940s and was participating in ceremonies at Andamooka in the late 1950s. his descendants include the Egan/Strangeways and Larkin families.—Attachment F at [3].

[110] A further example, about ancestor George Turner is as follows:

> 6. George Turner (Attachment A (a) (xvii))
>
> 11. George Turner was born at Oakden Hills (in the application area) in the late 1800s. He married Ena Sansbury who was born at Pt. Pearce in 1908 and died at Andamooka (in the application area). Hercus (1997:44) says he 'was of full Kukata descent born, probably in the early 1890s 'in the Woomera area'. She says he was the 'main person consulted by J.T. Platt for the Kukata language' (Platt 1972). His descendants have been identified as being related to the Turner, Williams, Wright, Sultan and Dingaman families and the family was in the Woomera and Roxby Downs areas in the 1950s-1970s (demography map 1955-1975).—Attachment F at [11].

[111] Much of this historical information about the association of the people listed at Attachment A includes information about the pastoral stations and places they have been associated with at various points in their lives. There are many place names included in this information, the following are just a few that represent a wide spread of the geographic locations discussed in the material: Billa Kalina, Andamooka, Roxby Downs, Woomera, Wirraminna, Oakden Hills and South Gap, amongst others, which all fall within the combined application area.

[112] Attachment F sets out a table that demonstrates the ancestral connection between the claim group via familial descent lines and the area throughout the period from the 1850s to the 1990s. I have included a copy of that table below:

18. The general ancestral connection between the claim group and the application area is summarised in the following table:

Ancestors	1850s	1870s	1890s	1910s	1930s	1950s	1970s	1990
1. Baker			☒	☒	☒	☒		
2. Davis	☒	☒	☒	☒	☒		☒	☒
5. Jinny	☒	☒	☒	☒	☒	☒	☒	☒
6. Larkins			☒	☒		☒	☒	
8. Reid		☒	☒	☒	☒	☒	☒	☒
11. Turner			☒			☒	☒	
12. Burbada		☒	☒	☒			☒	

Table 1: Ancestral identities and approximate chronology of association with the Application area.

[113] Further, Attachment F asserts that it is the traditional laws and customs, particularly the spiritual and religious narratives shared by members of the claim group that give rise to the rights and interests in the application area. On this point Attachment F states:

> Particulars of traditional laws and customs giving rise to rights and interests:
>
> 20. The members of the native title claim group share:
>
> a. A belief in and connection to spiritual and religious narratives relating to the application area. They acknowledge and observe traditional laws and customs (including those giving rise to rights and interests in relation to land and waters) arising from those beliefs;
>
> b. Ceremonial and marriage ties, including initiation practices;
>
> c. Traditional laws and customs under which they possess rights and interests in the application area, including but not limited to those rights and interests arising from:
>
> i. Descent from ancestors connected with the application area; and
>
> ii. Possession of traditional religious knowledge of the application area, participating in traditional ceremonies and rituals associated with the application area, and asserting responsibility for the application area—at [20].

[114] It is asserted that knowledge of the Dreaming tracks and sites across the application area provide a continuing relationship between the claimants and the application area. It is asserted that it is these Dreaming stories that give rise to the traditional laws and customs of the claim group and which form the foundation for the native title rights and interests possessed by them. The knowledge of this Dreaming, it is asserted, has been passed down through the generations.

[115] Attachment G of the application includes three (3) affidavits from claim group members. These affidavits provide examples of the kind of activities undertaken on the application area by the native title claim group. According to the deponents these activities demonstrate the kinds of traditional laws and customs taught to the claim group members by their preceding generations and which they continue to acknowledge and observe in the application area today.

[116] [name deleted] explains her connection to the application area as deriving from her parents, in particular her mother who was a Kokatha woman, as was her mother's father, her grandfather before her. She provides details of her grandfather's life. Including where he lived and some of the activities he undertook. An example is as follows:

> [name deleted] travelled and camped all around the Kokatha country, including through Arcoona, Roxby Downs, Purple Downs, South Gap and Andamooka. He travelled by foot with his firestick and his weapons. His family lived and travelled throughout the abovementioned area. When the Woomera area was closed off because of the Rocket Range he was sometimes stopped by the Range Patrol Officer and taken back to Andamooka.
>
> [name deleted] would check up on all the Kokatha people in the claim area, on everything they did. He did this because he was an important Kokatha man. Kokatha people listened to what he said. The old Kokatha people like my grandfather really controlled the country of the claim area—at [3] and [4].

[117] [name deleted] explains that she learnt about her country and Kokatha ways from her family and the 'old people':

> The claim area is my country because it is my family's country. The old Kokatha people taught me that. I would sit and listen to the old people. They would tell the stories about the country, what the bush looked like, where to go and not to go. I have a map in my head of where to go- not on paper. I can show that I learned and know the country by singing and dancing it. I do this often—at [11].

[118] Like [name deleted] the affidavit of [name deleted] details that she learnt about her country from her Grandmother and that she understands she has rights and interests in the area as a result of being a Kokatha person, through the older generations of her family. She states:

> I was taught all about my country by my grandmother, [name deleted], my mother and my aunties. They would teach us by drawing maps in the sand, showing us special places and teaching us their names. They told us about the country and the stories associated with it as we travelled around or as we were gathering food. This is how I know that I am Kokatha. They told us the names of all the trees and edible plants, the names of the places, especially the water places. They would show us how to dig in the big sandy creeks to find water. I continue to do these things in the claim area today with my children and my grandchildren—at [6].

[119] The affidavit of [name deleted] details the pattern of teaching younger generations about Kokatha customs and beliefs and outlines how this teaching continues today in the application area:

> I teach my children and grandchildren about Kokatha beliefs, customs and practices. I have taught my children and grandchildren how to catch kangaroo and cook it. I have taught them about the important Kokatha places and how to look after the country.
>
> I have taught them how to cook and eat wild cats, sleepy lizards, witchetty grubs, perenti, frill-necked lizards, emu and goanna. I have also taught my children and grandchildren about other bush food which I still eat on the claim area. This includes wild onions, quandongs (wild peach), wild apple and pitjiri (chewing tobacco). When I am on the claim area and when I return I bring the type of bush tucker described above and share it with my relatives.
>
> I have also taught my children and grandchildren about bush plants that you can use for medicine. I still use them myself—at [11], [12] and [13].

My consideration

[120] Based on the information in the application, examples of which are detailed above, I am satisfied that the claim group, as a whole, have and had an association with the application area.

[121] On this point, I note that the majority of the application area was recently determined, by consent, that native title exists over the area. The remaining portion of the application area known as the 'lake Torrens' area is the only portion not covered by the consent determination. That is, the majority of the area, and therefore the majority of the place names that detail the previous and ongoing association of the claim group with the area fall within the portion of the claim area that has been determined. I note however that there are references in the material to claim group members travelling all across the area, I take this to include the Lake Torrens portion of the claim area. Further, some of the place names, in particular Andamooka and South Gap are very proximate to the Lake Torrens area, which I note is all national park.

[122] [name deleted], in his affidavit, references several important places that he knows the songs and stories for and explains that he is responsible for passing these on to his children and grandchildren, amongst those places listed is Lake Torrens—at [17].

[123] The information contained in the application is detailed and clearly outlines that the claim group as a whole comprise a society, united by their understanding of the Dreaming as the origin of their spiritual association with their country and from which they derive their traditional laws and customs. I understand that this society derives their belonging to the application area from an understanding of Dreaming stories, descent from ancestors associated with the area and knowledge of traditional laws and customs of the Western Desert Bloc.

[124] Many of the place names or landmarks discussed in the material, as summarised above, fall within the external boundary of the application area or within close proximity to it. In particular, I understand that Billa Kalina, Roxby Downs, Wirraminna, Woomera, Oakden Hills, Lake Torrens and South Gap all referred to in the material, fall within the application area, as it was when combined before the determination was made.

[125] It is clear that the claim group have a strong physical association with the application area through, for example, visiting the application area for hunting and camping trips, being born on, walking all across and working on several of the stations across the application area. It is clear that senior members of the claim group take responsibility for protecting their country and are charged with continuing the knowledge and social norms of their society by teaching younger generations about the traditional laws and customs.

[126] The material demonstrates that the claim group also have a strong spiritual association with the application area. I understand that the claim group derive their belonging to country and the traditional laws and customs from their knowledge of and connection to Dreaming narratives which run throughout the application area. Attachment F states:

> From the time of sovereignty through until the present members of the claim group and their ancestors have known and recounted Dreaming narratives that connect them with the land and waters of the application area. This knowledge has been passed down from generation to generation and connects the claimants to the application area.
>
> These Dreaming narratives connected to the claim application area include *Wati Nyiru, Kalta, Kunkaralinya or Minyma Tjuta (Seven Sisters), Urumbulla or Kinika (Native Cat)* and other dreaming the naming of which can, depending upon the circumstances, cause offence, but details of which can be provided. Knowledge of and belief in these dreaming and sites and tracks associated with these dreaming provide a continuing relationship between the claimants and the application area. Members of the native title claim group exercise authority over and responsibility for these dreaming and the sacred sites and tracks which are associated with them—at [21] and [22].

[127] I therefore understand that the Dreaming time is central to the identity of the native title claim group, which is united by and bound by rules that arise as a result of the Dreaming. It is asserted in the information before me that a strong tradition of oral transmission of cultural knowledge including with respect to significant places on the application area continues to be a foundation of the claim group's traditional laws and customs. The affidavit material demonstrates a strong pattern of teaching laws and customs such as hunting and collecting food. It is my view that this pattern of teaching paired with an understanding of the spiritual origins of the claim group's societal identity demonstrates that the claim group and their more immediate predecessors have (and had) an association with the application area. On this point, I note that the deponents of the affidavits were all born in the 1920s, and in many cases speak of their grandparents, who the material states were likely on the application area around the mid 1800s.

The affidavit evidence suggests in many cases that the grandparental generation were present on the application area in a time prior to dominant European contact in the area. Further, each of the deponents of the affidavits is listed as one of the people used to describe the claim group at Schedule A, or is a close descendant of one of the ancestors, used to describe the claim group at Schedule A.

[128] It is therefore my view that there is an available inference that the pattern of oral teaching would have continued in much the same way beyond the generations remembered by the deponents of the affidavits, such that the pattern of teaching, extends to the generations who were present on the application area in a time prior to sovereignty, and, according to the spiritual beliefs of the claim group, back to the Dreaming time.

[129] On this basis, I am of the view that the material supports an assertion that there is an association of the whole claim group and their predecessors over the area throughout the period since sovereignty.

[130] For the above reasons I am satisfied that the application meets the criteria in s 190B(5)(a).

Reasons for s 190B(5)(b)

[131] Dowsett J in *Gudjala [2007]* linked the meaning of 'traditional' as it appears in s 190B(5)(b) with that at s 223(1) in relation to the definition of 'native title rights and interests'. This idea of 'traditional' necessarily requires consideration of the principles derived from Members of the *Yorta Yorta Aboriginal Community v Victoria (2002)* 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*). This aspect of Dowsett J's decision was not criticised by the Full Court on appeal—*Gudjala FC* at [90]–[96].

[132] Dowsett J's examination of *Yorta Yorta* lead him to conclude that a necessary element of this aspect of the factual basis is the identification of a relevant society at the time of sovereignty, or at least, first European contact—*Gudjala [2007]* at [26]. I understand that a sufficient factual basis needs to address that the traditional laws and customs giving rise to the claimed native title have their origins in a pre-sovereignty normative society with a substantially continuous existence and vitality since sovereignty.

[133] Dowsett J stated in *Gudjala [2007]* that the facts necessary to support this aspect of the factual basis must address:

- that the laws and customs currently observed have their source in a pre-sovereignty society and have been observed since that time by a continuing society—at [63];
- that there existed at the time of European settlement a society of people living according to a system of identifiable laws and customs, having a normative content— at [65]; and see also at [66] and [81]; and

- the link between the claim group described in the application and the area covered by the application, which, in the case of a claim group defined using an apical ancestry model, may involve 'identifying some link between the apical ancestors and any society existing at sovereignty, even if the link arose at a later stage'—at [66] and see also at [81].

The applicant's factual basis material

[134] as outlined above it is asserted that the claim group are united by the traditional laws and customs of the Western Desert Bloc and that their rights and interests in the land and waters of the application area arise from a common understanding of the spiritual and religious narratives of the application area, in particular the Dreaming stories, songs and tracks associated with the application area. Additionally it is asserted that the rights and interests arise as a result of descent from ancestors' association with and connection to the area and through other ceremonial and initiation related practices. All of these aspects, it is asserted, form the basis or origin of the rights and interests in the application area and are asserted to be traditional, in the sense that through the belief in the Dreaming there is a spiritual understanding of ongoing connection with the area that is passed through the generations via oral modes of teaching.

[135] Further, it is asserted that it is these same laws and customs acknowledged and observed today that have their origin in a time prior to the assertion of sovereignty.

[136] There are many examples in the affidavit material at Attachment G of the laws and customs, said to be traditional, currently acknowledged and observed by claim group members.

[137] [name deleted] explains that trading things, artefacts and bush medicine for example, is something that her grandfather did with other Aboriginal people and she continues to do today. Trade it is asserted, played and continues to play a central role in the society of the application area throughout the generations back to a time prior to sovereignty. An example is as follows:

> My grandfather, [name deleted], would trade things as he travelled around. He traded wild tobacco from Indulkana for boomerangs, spears, and other things. Trading was a way of keeping in touch with others and saying that we are still together.
>
> I still do this trade. I especially trade artefacts and bush medicine from the claim area with Aboriginal people from way up north or down south, and when I visit Melbourne or Adelaide.—at [5] and [6].

[138] Other examples of traditional laws and customs undertaken by claim group members today include gathering bush medicine and bush food, as well as hunting and camping on the application area. Below are some examples of these activities:

> I gather bush medicine. There are some good places in the claim area for the *irminga-irminga* bush. We grind it up and mix it with oil and use it for many things: headaches, colds, aching back. I

continue to teach my children and the young ones about medicines and bush tucker—affidavit of [name deleted] at [8].

[139] [name deleted] states:

> I have always hunted for food in the claim area. I hunted for all sorts of food including Kangaroo (*malu*), lizards, rabbits, even the old wombat. He was hard to catch. I also gathered wild peaches, bush tomatoes, mushrooms, wild apple, root vegetables, yams, 'wild parsnip' and wild tea. I also gathered honey ants and witchetty grubs. I still go hunting and gathering with my family in the claim area, and teach my children and grandchildren about that country. I also teach about our culture to children in schools—at [7].

[140] [name deleted] speaks of camping on the application area:

> I do not currently live on the claim area, however I do go back to camp on those lands. I camp in the bush near Andamooka. I used to take my children to teach them about the bush. Now I take my grandchildren and teach them. We all camp—at [10].

[141] Each of the deponents of the affidavits at Attachment G speaks of the importance of protecting sacred and special places on the application area. Each of the deponents speaks of learning about their country from older family members and passing this knowledge, especially of the special places and areas that need protecting onto younger generations, like their children and grandchildren. As an example, [name deleted] speaks of the special Kokatha women's places and how she teaches younger generations of women about them as follows:

> Kokatha women still know the culture of the claim area and hold it for that country. We go there for the culture now, we know all the special places. I teach the culture to both younger Kokatha women and my own children and grandchildren—at [13].

[142] [name deleted] explains that he checks up on important places regularly:

> When I go onto the claim area I look after the important Kokatha places- either places that are important for the Kokatha culture or heritage, or important sources of food or water. I clean up rockholes, soaks and other water sources
>
> I check important cultural sites to make sure that they have not been damaged or disturbed. If I see people near the sites of importance I tell them to keep away. I check for damaged food sources- for example to make sure that quandong trees are healthy—at [14] and [15].

[143] It is clear from the affidavit material that the Kokatha language is spoken by each of the deponents and that they continue to teach the younger generations this language. Further, each of the deponents discusses having been involved in studies, site protection and anthropological work in the claim area in order to protect objects of cultural and heritage significance. [name deleted] provides some information about Kokatha ceremonies, he states that his wedding was a

traditional Kokatha marriage and that he underwent Kokatha initiation when he was 26 and that he was initiated by older Kokatha men.

[144] As mentioned above much of the information in Attachment F speaks to the historical association with the application area of those people used to describe the claim group at Attachment A. some examples of the kind of information about the lives of these people are extracted at my reasons for s 190B(5)(a) above at [106] and [107]. It is also relevant to note that many of these historical summaries of the lives of the claim group's ancestors mention their participation in ceremonies or initiation. Some examples include:

> Dick Thomas was born on the western side of the Application area—either at Bon Bon Station or Lake Phillipson in the late 1890s. Hercus (1997:45) says Dick 'was of Kukata descent, and born around 1890'. She says he 'was a speaker of Kukata, but had been through the Parnkalla men's ceremonies'—at [6].

[145] And;

> Mick (see Hilda Captain etc in subparagraph 3 above) and George Reid are the sons of Myla Reid, born at Ooldea. Mick and George were born at Mt Ive Station, adjacent to the application area, in the 1880s. they identify as Kokatha and worked in the Nonning— Iron Knob area in the 1920s and 1930s, and were in the Andamooka area in the 1950s- 1970s. Mick Reid went through men's ceremonies and his son, Ningel is *Wati*—at [10].

My consideration

[146] The information provided at Attachments F and G does not assert when European contact was likely to have first occurred in the application area. I note that each of the persons who have provided affidavit material state that they were born during the 1920s and they are each able to link themselves, through family members, to either the listed ancestors or some of the earlier descendants of the claim group. As outlined above at my reasons for s 190B(5)(a), the information before me demonstrates continuing lines of descent associated with the application area dating as far back as the 1850s.

[147] Some of the information in the affidavits suggests that the generations immediately preceding the deponents were likely living on the application area undisturbed by European settlement. In particular [name deleted] talks about the life of her grandfather [name deleted]. Of [name deleted]'s life she states:

> [name deleted] travelled and camped all around the Kokatha country, including through Arcoona, Roxby Downs, Purple Downs, South Gap and Andamooka. He travelled by foot with his firestick and his weapons. His family lived and travelled throughout the abovementioned area…—at [3].

[148] Similarly, [name deleted], when discussing where he was born describes being born in the bush, before the Woomera Rocket Range was established:

> I was born at Mount Eba Station on 4th July 1922. I was born close to the area which became the Woomera Rocket Range. I was born in the bush- in a little camp…—at [1].

[149] Further, the information in Attachment F occasionally refers to researchers discussing the lives of the ancestors of the claim group as being very traditional; 'Ruby is described by Hercus (1997:47) as a 'very traditional' woman from the Ooldea area'. I understand that Ruby, like many of the people whose lives are detailed at Attachment F, was in the application area in the mid to late 1800s—at [16].

[150] Descriptions like these, of the lives of the deponents and the generations before them living lives 'in the bush' and 'travelling by foot', suggest that these persons were likely occupying the application area undisturbed by European settlement at a time prior to or at the very beginning of sustained European contact with the area. Given the remote location in South Australia of the claim area, and the inclusion of information like the above statements, I understand that sustained European contact could likely have occurred in the area much later than the assertion of sovereignty. I therefore infer that the ancestors living throughout the mid to late 1800s in the area were likely doing so at a time largely uninterrupted by European settlement.

[151] I again note that the majority of the application area has been determined in favour of the claim group holding native title since this combined application was filed.

[152] It is clear from the examples extracted above and other information in Attachments F and G that the society to which the claim group belong rely on a very rich and ongoing tradition of oral transmission of cultural information. Each of the deponents speak about having learnt about their country, about the special places, the boundaries of their country and the stories of their country from older generations, specifically parents, grandparents and other 'old people'. Each of the deponents also speak of transmitting this knowledge to today's younger generations, and in particular they talk of continuing practices relating to collecting bush foods and medicines, camping and hunting, and teaching their children and grandchildren how to protect their country, and the stories and songs that provide the spiritual connection of the claim group to their country.

[153] The material demonstrates a factual basis supporting a rich, continuous system of normative rules or laws and customs, which are acknowledged and observed, by the claim group members, in the application area today. I understand the factual basis to say that these laws and customs are rooted in a spiritual belief system which has at its core the concept of the Dreaming narratives and associated songs and story tracks. It is asserted that it is from the belief in these Dreaming stories that the claim group's traditional laws and customs originate, and it is asserted

that it is these same laws and customs to which the native title claim group continue to abide today. It is asserted that the claim group are themselves those people listed at Schedule A or are the descendants of the ancestors listed at Schedule A, and that those ancestors are in turn descendants of those people who, bound by the same laws and customs, occupied the application area back to a time prior to sovereignty. Indeed the parents and grandparents discussed by the deponents of the affidavits as having played an integral role in teaching them about the laws and customs of the claim group are in many instances those people used to describe the claim group at Schedule A, who it is asserted at Attachment F were associated with the application area during the mid to late 1800s.

[154] I am of the view that there is sufficient detail in the factual basis material provided to demonstrate a strong pattern of inter generational transmission of cultural practices and belief systems unique to a society of people that have been occupying and affiliated with the claim area and beyond for many generations. The factual basis material supports the assertion that these laws and customs have been orally transmitted in a substantially unchanged manner since at least the time at which the ancestors identified in Schedule A were occupying the application area and surrounding affiliated country in the mid to late 1800s.

[155] In *Gudjala [2009]* Dowsett J discussed circumstances where it may be possible to infer continuity of the relevant pre-sovereignty society:

> In some cases it will be possible to identify a group's continuous post-sovereignty history in such detail that one can infer that it must have existed at sovereignty simply because it clearly existed shortly thereafter and has continued since. It would similarly be possible, in those circumstances, to infer that the assertion of sovereignty had not significantly affected its laws and customs, so that the laws and customs shortly after sovereignty were probably much the same as pre-sovereignty laws and customs—at [30].

[156] In my view, the factual basis materials are sufficient to support an assertion that there has been strong cultural continuity since the generation of the apical ancestors through to the present generations. This, in my view, is sufficient to support an inference that this cultural vitality and continuity is likely to have been transmitted in much the same way in the period between the mid 1800s and sovereignty.

[157] Having regard to all of this information I am satisfied that the factual basis provided is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group which give rise to the claimed native title rights and interests.

[158] For the above reasons I am satisfied that the application meets the criteria in s 190B(5)(b).

Reasons for s 190B(5)(c)

[159] I am of the view that this requirement is also necessarily referable to the second element of what is meant by 'traditional laws and customs' in *Yorta Yorta*, being 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—at [47] and also at [87].

[160] *Gudjala [2007]* indicates that this particular assertion may require the following kinds of information:

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

[161] The Full Court in *Gudjala FC* appears to agree that the factual basis must identify the existence of an Indigenous society at European settlement in the application area observing laws and customs—at [96].

[162] In addressing this aspect of the factual basis Dowsett J in *Gudjala [2009]* considered that, should the claimants' factual basis rely on the drawing of inferences, it was necessary that a clear link be provided between the pre-sovereignty society and the claim group:

> Clear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity—at [33].

[163] As I have outlined in my reasons above, I have inferred that the society of Aboriginal people occupying the claim area around the mid to late 1800s is likely substantially the same society which would have occupied the claim area prior to the assertion of sovereignty. There are many examples at Attachment F and G of the application, some of which are extracted above, of the traditional laws and customs of the claim group. It is clear from the demonstrated pattern of intergenerational transmission of cultural knowledge that the examples of laws and customs practiced by claim group members today were taught to them by earlier generations of the claim group. This pattern of teaching it is asserted extends back to the ancestors used to describe the claim group who, the information asserts, were in many cases occupying the application area around the mid to late 1800s. I am therefore able to infer that this pattern of teaching would likely have continued between that period (the mid 1800s) back to sovereignty in much the same way as demonstrated in the material before me.

[164] It is my view that this strong link between the ancestors identified at Schedule A and the current claim group members paired with the pattern of intergenerational transmission of key cultural practices, back to a generation present on the application area at what I have inferred is around the time of first European contact, demonstrates a sufficient factual basis for the assertion that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs.

[165] For the above reasons I am satisfied that the application meets the criteria in s 190B(5)(c).

Conclusion

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

Subsection 190B(6)
Prima facie case

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

[167] The pertinent question at this requirement is whether or not the claimed rights and interests can be prima facie established. Mansfield J, in *Doepel*, discussed what 'prima facie' means stating that, 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—at [135]. It is accepted that the Registrar may be required to undertake some 'weighing' of the material or consideration of 'controverting evidence' in order to be satisfied that this condition is met—at [127].

[168] In undertaking this task I am of the view that I must have regard to the relevant law as to what is a native title right and interest as defined in s 223(1) of the Act. I must therefore consider, prima facie, whether the rights and interests claimed:

- exist under traditional law and custom in relation to 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.

[169] 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 water'—*Western Australia v Ward [2002]* HCA 28 (*Ward HC*), Kirby J at [577]; remembering '[t]hat the words 'in relation to' are of wide import'—(*Northern Territory of Australia v Wlyawayy, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005]* FCAFC 135 (*Alyawayy FC*).

[170] The claimed native title rights and interests that I consider can be prima facie established are identified in my reasons below. Where certain rights and interests are similar or rely on similar factual basis material I have grouped them together.

Consideration

Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply), members of the native title claim group claim the right to possess, occupy, use and enjoy the lands and waters of the application area as against the whole world, pursuant to their traditional laws and customs.

[171] In *Ward HC* the majority considered that the 'expression "possession, occupation, use and enjoyment...to the exclusion of all others" is a composite expression directed to describing a particular measure of control over access to land' and conveys 'the assertion of rights of control over land'—at [89] and [93].

[172] Further, it was held that:

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

[173] The Court in *Griffiths v Northern Territory of Australia [2007]* FCAFC 178 (*Griffiths FC*) examined the requirements for proving that the right to exclusive possession is vested in the native title claim group, finding that:

> ... the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. It depends rather on consideration of what the evidence discloses about their content under traditional law and custom.—at [71].

[174] It is my view that there is little information before me which speaks to the existence of this right, prima facie. Much of the information at Attachment F speaks of the origins of the traditional laws and customs for the claim group, being the connection through the Dreaming narratives and tracks. Further, the affidavits at Attachment G provide details of current claim group members and the generations in living memory before them undertaking activities pursuant to their traditional laws and customs in the area.

[175] It is my view that the information, particularly at Attachment G is concerned with the Spiritual and everyday attributes of the society of Aboriginal people connected to the claim area, there is a great deal of information about different uses of the claim area and of claim group members frequently accessing and occupying the claim area throughout the generations,

however it is my view that this material does not speak to the level of control over access, or the ability to exclude others from the area or need to be asked permission before entering the area that the right of exclusive possession is concerned with.

[176] I note that [name deleted], in her affidavit, when speaking about her Grandfather states:

> [name deleted] would check up on all the Kokatha people in the claim area, on everything they did. He did this because he was an important Kokatha man. Kokatha people listened to what he said. The old Kokatha people like my grandfather really controlled the country of the claim area—at [4].

[177] This is the only example in the material before me that speaks of any claim group members exercising any specific control over the application area. It is my view that this on its own is insufficient to support the existence of this right, pursuant to traditional law and custom, prima facie.

[178] **Outcome:** not established, prima facie.

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

(a) the right to access and move about the application area;

(f) the right to live, to camp and to erect shelters on the application area;

[179] It is my view that these rights are established, prima facie. There is a great deal of information in the material before me about the claim group accessing the application area and moving or travelling across it for various purposes. It is clear, particularly from the affidavit material, that many generations of the claim group have traversed the area for various purposes relating to, for example, subsistence activities and spiritual activities, amongst other things.

[180] The affidavit material discusses in some detail that claim group members regularly camp across the application area, there is mention of erecting shelters and windbreaks for this purpose and of taking younger generations on to the application area to camp. By way of example, [name deleted], in her affidavit states:

> I still go camping in the sand hills in the claim area with my family when we are able, but I make sure that I am not camping in the old camping places where the old people camped. We construct our own wind breaks and shelters—at [9].

[181] Similarly, [name deleted] states:

> I do not currently live on the claim area, however I do go back to camp on those lands. I camp in the bush near Andamooka. I used to take my children to teach them about the bush. Now I take my grandchildren and teach them. We all camp—at [10].

[182] It is my view that examples like these and others in the material before me establish the existence of these rights, prima facie.

[183] **Outcome:** established, prima facie.

(b) the right to hunt on the application area;

(d) the right to gather and use the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone and resin;

(g) the right to cook on the application area and to light fires for all purposes other than the clearance of vegetation;

[184] It is my view that the information before me speaks to the existence of each of these rights, prima facie. Attachment F states, in relation to the resources of the application area:

> The historical, ethnographic and anthropological record also describes the use of the resources of the application area by Aboriginal people. Access to and use of these resources was and still is regulated in accordance with the traditional laws and customs of the Aboriginal peoples of the application area—at [24].

[185] The affidavits at Attachment G provide many examples of claim group members hunting and gathering food and cooking it across the application area. It is clear the deponents were taught how to undertake these activities by the generations of claim group members before them and that they continue to teach younger generations today. I therefore understand these activities to be traditional, in that they have been passed via modes of oral teaching through the generations.

[186] Further, the affidavit material provides examples of other natural resources being collected for various activities, pursuant to the traditional laws and customs of the claim group. These activities include collecting resources for bush medicines, for making tools and artefacts and for trading with other Aboriginal people in the region. The following are some examples of the kinds of information relevant to these rights found in the affidavit material:

> I gather bush medicine. There are some good places in the claim area for the *irminga-irminga* bush. We grind it up and mix it with oil and use it for many things: headaches, colds, aching back. I continue to teach my children and the young ones about medicines and bush tucker—affidavit of [name deleted] at [8].

[187] Similarly, [name deleted] states:

> I have taught them [his children and grandchildren] how to cook and eat wild cats, sleepy lizards, witchetty grubs, perenti, frill-necked lizards, emu and goanna. I have also taught my children and grandchildren about other bush food which I still eat on the claim area. This includes wild onions, quandongs (wild peach), wild apple and pitjiri (chewing tobacco). When I am out on the claim area and when I return I bring the type of bush tucker described above and share it with my relatives—at [12].

[188] It is my view that these and other examples like them in the material before me establish the existence of these rights, prima facie.

[189] **Outcome:** established, prima facie.

(e) The right to use the natural waters resources on the application area;

[190] The affidavit material speaks of the deponents learning about the water sources on the application area particularly the waterholes and soaks across the application area. Additionally the deponents speak of knowing how to find water in some of the trees and from other sources across the application area. I understand from the material in the affidavits before me that the deponents are concerned to protect the natural water sources on the application area and rely on them when accessing the area when, for example, camping and preparing food on the application area.

[191] Information concerning the use of natural water resources from the affidavit of [name deleted], when speaking of having been taught about her country from other older women, is as follows:

> They told us the names of all the trees and edible plants, the names of places, especially the water places. They would show us how to dig in the big sandy creeks to find water. I continue to do these things in the claim area with my children and grandchildren—at [6].

[192] Similarly, [name deleted] states:

> I know how to find water and to look after the soaks and waterholes. I also know how to get water from the trees, the *ibara* tree and the gabi *ngundaberi*. It is important that the children know how to do this also. Accordingly I teach my family about these things—at [9].

[193] There are other examples in the affidavit material of the deponents speaking about knowing, protecting and using the natural waters sources across the application area. It is my view that this right is established, prima facie.

[194] **Outcome:** established, prima facie.

(h) The right to share or exchange subsistence or other traditional resources obtained from the application area;

[195] Each of the deponents of the affidavits speaks about the importance of sharing things with other claim group members. Also, there is information in the affidavit material that speaks of claim group members engaging in trade of artefacts and other resources with Aboriginal people in surrounding areas. In particular [name deleted] discusses her grandfather trading artefacts and how she continues to trade items today:

> My grandfather, [name deleted], would trade things as he travelled around. He traded wild tobacco from Indulkana for boomerangs, spears, and other things. Trading was a way of keeping in touch with others and saying that we are still together.
>
> I still do this trade. I especially trade artefacts and bush medicine from the claim area with Aboriginal people from way up north or down south, and when I visit Melbourne or Adelaide.
>
> The Kokatha way is that you must have permission to take something from the country if it is not yours. If someone from outside wanted to take seeds for necklaces or grinding stones they would have to trade it for something. If they do not trade, it should be left on the country—at [5], [6] and [7].

[196] There are other examples in the material of claim group members sharing resources, like food they have hunted with other claim group members. An example of [name deleted] discussing sharing food with other claim group members is extracted above at [184]

[197] It is my view that these examples, and others like them in the material before me establish the existence of this right, prima facie.

[198] **Outcome:** established, prima facie.

(i) The right to engage and participate in cultural activities on the application area including those relating to births and deaths;

[199] The right to engage and participate in cultural activities is a very broadly stated right. There are many examples in the material of claim group members undertaking activities that I would describe as cultural. Such as teaching on the application area, protecting and visiting sacred and special sites. Of particular relevance to this claimed right is the mention of women's culture and of claim group members going to special places on the application area for women's culture in the affidavit of [name deleted]:

> Kokatha women still know the culture of the claim area and hold it for that country. We go there for the culture now, we know all the special places. I teach the culture to both younger Kokatha women and my own children and grandchildren—at [13].

[200] Further, [name deleted] in her affidavit, talks of having responsibility for protecting her younger brother's burial site:

> My little brother, [name deleted] was born at Andamooka. He died when he was a baby and is buried in Andamooka Opal Fields. We have responsibility for looking after his burial site. Several years ago when people were threatening to build a house over the grave, my sister [name deleted] and her husband [name deleted] stopped the building of the house on the burial site, and erected a fence around it to protect it—at [4].

[201] It is my view that although this is a very broadly stated right, the information before me speaks to various cultural activities being engaged in across the application area, including relation to, for example, burials. The examples above demonstrate some of the information relevant to establishing the existence of this right, prima facie.

[202] **Outcome:** established, prima facie.

(j) The right to conduct ceremonies and hold meetings on the application area;

[203] The material before me includes information regarding the conduct of ceremonies and meetings on the application area. As mentioned above, some of the information about the lives of the ancestors of the claim group members at Attachment F includes information about, particularly some of the men, being engaged in men's ceremonies on the application area. The affidavit material also discusses claim group members going through men's ceremonies, though it seems these do not necessarily always take place on the application area today.

[204] Further, the affidavit material discusses appropriate ceremonies being conducted after heritage clearances and also traditional Kokatha weddings taking place on the application area. The deponents of the affidavits talk of long having attended meetings on the application area, in particular to discuss heritage and cultural protection issues, especially with the rise of mining in the area since 1982.

[205] Information like that which I have summarised here satisfies me of the existence of this right, prima facie.

[206] **Outcome:** established, prima facie.

(k) the right to teach on the application area the physical and spiritual attributes of locations and sites within the application area;

[207] There is a great deal of information speaking to the existence of this right, prima facie. The affidavits at Attachment G provide many examples of claim group members learning about the physical and spiritual attributes of the application area from older generations and similarly teaching the younger generations those same attributes. I understand that this oral transmission of key cultural information is central to the connection and continuity of the traditional laws and customs of the claim group.

[208] Some examples of claim group members being taught and teaching about the physical and spiritual attributes of locations and sites within the application area are as follows:

> The claim area is my country because it is my family's country. The old Kokatha people taught me that. I would sit and listen to the old people. They would tell the stories about the country, what the bush looked like, where to go and not to go. I have a map in my head of where to go- not on paper. I can show that I learned and know the country by singing and dancing it. I do this often—affidavit of [name deleted] at [11].

[209] And;

> I was taught all about my country by my grandmother, [name deleted], my mother and my Aunties. They would teach us by drawing maps in the sand, showing us special places and teaching us their names. They told us about the country and the stories associated with it as we travelled around or as we were gathering food. This is how I know I am Kokatha. They told us the names of all the trees and edible plants, the names of the places, especially the water places. They would show us how to dig in the big sandy creeks to find water. I continue to do these things in the claim area today with my children and my grandchildren—affidavit of [name deleted] at [6].

[210] It is my view that these examples, and others like them in the material before me, establish the existence of this right, prima facie.

[211] **Outcome:** established, prima facie.

(l) the right to maintain and protect sites and places of significance under traditional laws and customs on the application area;

(m) the right to maintain, conserve and/or protect significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing (by all reasonable lawful means) any activity occurring on the application area which may desecrate, damage, disturb or interfere with any such ceremony, artwork, song cycle, narrative, belief of practice;

(n) the right to prevent (by all reasonable lawful means) any use or activity within the area which under traditional laws and customs is unauthorised or inappropriate in relation to significant locations, sites or objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area;

[212] Each of the deponents of the affidavits speaks of the importance of protecting sites of significance and places associated with Dreaming narratives and tracks. It is clear that the older generations of the claim group are charged with the responsibility of protecting key cultural places and significant sites and that this extends to preventing (where possible) actions that would cause damage or interfere with these sites.

[213] By way of example [name deleted] in his affidavit states:

> When I go onto the claim area I look after the important Kokatha places- either places that are important for the Kokatha culture or heritage, or important sources of food or water. I clean up rockholes, soaks and other water sources.
>
> I check important cultural sites to make sure that they have not been damaged or disturbed. If I see people near the sites of importance I tell them to keep away. I check for damaged food sources- for example to make sure that quandaon trees are healthy—at [14] and [15].

[214] There are many contemporary examples of claim group members being involved in heritage surveys, protection of sites from mining and disputes with government and mining companies about the protection of sites. I understand this to be an extension or contemporary mechanism for undertaking the traditional right or interest that is protecting important and sacred sites across the claim area. In relation to these kinds of activities [name deleted] states:

> Since about 1982 I have been involved in many anthropological studies, meetings, site and work area clearances and negotiations in relation to the protection of areas and objects of cultural and heritage significance to Kokatha people on the claim area. Many of these have related to the protection of Kokatha traditional sites, objects and culture at the Olympic Dam Special Mining Lease and adjacent Stuart Shelf exploration lease held by Western Mining. I have often coordinated the involvement of the relevant Kokatha women in these activities- including organising the appropriate cultural celebration (*inma*) after successful heritage protection initiatives—at [12].

[215] It is my view that these and other examples like them in the material before me establish the existence of these rights, prima facie.

[216] **Outcome:** established, prima facie.

(o) the right to be accompanied on to the application area by those people who, though not members of the native title claim group, are:

> *(i) spouses of members of the native title claim group,*
>
> *(ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the application area; or*
>
> *(iii) people required by members of the native title claim group to assist in, observe, or record traditional activities on the application area.*

[217] It is my view that there is insufficient information before me to establish the existence of this right, prima facie.

[218] There is little information which discusses bringing people who are not members of the native title claim group onto the application area for any purpose. I understand that it is likely that people required to undertake research or complete heritage surveys are brought onto the application area, however there is no information before me that directly references that occurring, and in any case it is hard to see how such an activity could arise as a result of traditional law and custom.

[219] Whilst it is possible that people who are not members of the native title claim group are brought onto the application area for various purposes including undertaking ceremonial or cultural activities, it is my view that the material before me does not speak in any significant way to these kinds of activities taking place.

[220] **Outcome:** not established, prima facie.

(c) the right to fish on the application area;

[221] It is my view that there is insufficient information before me to establish the existence of this right, prima facie.

[222] As discussed above there is information before me regarding the use of natural water sources, including creeks, water holes and soakages across the application area by the claim group. It may be possible that the claim group also undertake fishing in some of the natural water sources. However, the information does not speak to the claim group fishing at all. There is no mention in the affidavit material of the claim group catching or preparing fish to eat amongst the various lists of bush food hunted and collected across the application area.

[223] Without further information speaking to the claim group undertaking fishing in the application area it is my view that this right cannot be established, prima facie.

[224] **Outcome:** not established, prima facie.

Conclusion

[225] The application satisfies the condition of s 190B(6).

Subsection 190B(7)
Traditional physical connection

The Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or

(b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity, or

(ii) a statutory authority of the Crown in any capacity, or
(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[226] I understand the phrase 'traditional physical connection' to mean a physical connection with the application area in accordance with the traditional laws and customs of the group as discussed in the High Court's decision in *Yorta Yorta—Gudjala [2007]*—at [89].

[227] Mansfield J in *Doepel* considered the Registrar's task at s 190B(7) and stated that it requires the Registrar 'to be satisfied of particular facts', which will necessarily require the consideration of evidentiary material, however, I note that the role is not the same as that of the Court at hearing, and in that sense the focus is a confined one—at [18].

[228] Mansfield J commented:

> The focus is upon the relationship of a least one member of the native title claim group with some part of the claim area. It can be seen, as with s 190B(6), as requiring some measure of substantive (as distinct from procedural) quality control upon the application if it is to be accepted for registration—*Doepel* at [18].

[229] As I am required to be satisfied that at least one member of the native title claim group has, or previously had, a traditional physical connection with any part of the land or waters covered by the application, I have chosen to concentrate my attention on the factual basis provided pertaining to one member of the claim group, namely [name deleted].

[230] I understand that [name deleted] was born on the application area at Mount Eba station in 1922. He describes the station as being close to the area which became the Woomera Rocket Range. [name deleted] states that he was born in the bush in a little camp. [name deleted]'s mother was a Kokatha woman and was also born on the application area.

[231] [name deleted]'s affidavit makes clear that he grew up on the application area, as a child living on Mount Eba station and as a young man and throughout much of his life working mustering cattle, predominantly on stations across or proximate to the application area.

[232] [name deleted] states that he no longer lives on the application area but regularly visits it. He states that, given his age he is dependent on other family members for transport now and is often only able to visit the area around once a year.

[233] Despite this it is clear that [name deleted] continues to return to the application area to undertake various traditional activities and protect the important sites across the application area. [name deleted] states that when he visits the application area he usually camps in the bush near Andamooka. He often takes his children and grandchildren camping with him.

[234] When camping with his family he teaches his children and grandchildren about Kokatha beliefs, customs and practices. He gives examples like teaching them to catch and cook kangaroo and how to prepare other bush foods like wild cats, sleepy lizards and witchetty grubs.

[235] I understand that when on the application area [name deleted] also teaches the younger generations about bush medicines and that he continues to gather resources and use the bush medicines today.

[236] [name deleted]'s affidavit states that he knows the stories and important places for the Kokatha people across the application area and when he returns to the application area he checks up on all the places. He ensures that no damage has been done to any important places or important food sources, like quandong trees. He cleans natural water sources like soaks and rockholes and if he sees any people near important sites he asks them to leave, in order to protect the site.

[237] It is clear from the information provided in [name deleted]'s affidavit at Attachment G of the application that he has a current physical connection with the application area. I am also satisfied that the material can be said to be 'traditional' as it is clear that the connection [name deleted] has with the area and the laws and customs he acknowledges and observes in relation to the area have been taught to him by the generations before him, particularly through the initiation process he underwent as a young man. It is clear that the traditional laws and customs [name deleted] acknowledges and observes are rooted in a belief in the Dreaming, from which the claim group, and their predecessors, derive the laws and customs, to which they adhere. It is these laws and customs, that have been passed through the generations since a time prior to sovereignty and that [name deleted] understands were taught to him and that he teaches to his children and grandchildren and other young people in the claim group today.

[238] For these reasons I am satisfied that the material is sufficient to support an assertion that [name deleted] currently has, and previously had, a traditional physical connection with the application area.

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

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

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
> Section 61A provides:
> (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If:
(a) a previous exclusive possession act (see s 23B) was done in relation to an area; and
(b) either:
(i) the act was an act attributable to the Commonwealth; or
(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23E in relation to the act;
a claimant application must not be made that covers any of the area.
(3) If:
(a) a previous non-exclusive possession act (see s 23F) was done in relation to an area; and
(b) either:
(i) the act was an act attributable to the Commonwealth, or
(ii) the act was attributable to a State or Territory and a law of the State or Territory has made provision as mentioned in s 23I in relation to the act;
a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
(4) However, subsection (2) or (3) does not apply to an application if:
(a) the only previous exclusive possession act or previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made; and
(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

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

Section 61A(1)

[241] 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.

[242] As noted above, a large portion of this application area has been determined since the combined application was filed. At the time the application was made however, there was no determination of native title over any of the application area. I also note that since the making of the determination, Part B, the Lake Torrens area of the application, remains undetermined.

[243] In my view the application does not offend the provision of s 61A(1).

Section 61A(2)

[244] 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.

[245] Attachment B1 of the application lists general exclusions from the application area. It states that the application area excludes any land or waters covered by 'a "previous exclusive possession act" as defined in s 23B of the NTA which is attributable to the State of South Australia

and is not an "expected act" as defined in section 36F of the *Native Title (South Australia) Act 1994* (SA)'.

[246] In my view the application does not offend the provision of s 61A(2).

Section 61A(3)

[247] 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.

[248] Schedule E states that the application only claims exclusive possession 'over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s.238 and/or ss.47, 47A and 47B apply)'.

[249] In my view the application does not offend the provision of s 61A(3).

Conclusion

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

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

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

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

Section 190B(9)(a)

[252] Schedule Q of the application states 'the native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.'

[253] The application does not offend the provision of s 190B(9)(a).

Section 190B(9)(b)

[254] Schedule P of the application states 'the native title claim group does not claim exclusive possession over all or part of waters in an offshore place within the application area'.

[255] The application does not offend the provision of s 190B(9)(b).

Section 190B(9)(c)

[256] The application does not disclose, and I am not otherwise aware, that the native title rights and interests have otherwise been extinguished.

[257] The application does not offend the provisions of s 190B(9)(c).

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Kokatha native title claim
NNTT file no.	SC2014/002
Federal Court of Australia file no.	SAD90/2009

In accordance with ss 190(1) and 186 of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

18 June 2009

Date application entered on Register:

17 November 2014

Applicant:

Andrew Starkey and Joyleen Thomas

Applicant's address for service:

As per Extract from the Schedule of Native Title Applications

Area covered by application:

As per Extract from the Schedule of Native Title Applications but also add the following:

The application area excludes any land or waters that is or has been covered by:

a) a Scheduled Interest;

b) a freehold estate;

c) a commercial lease that is neither an agricultural lease nor a pastoral lease;

d) an exclusive agricultural lease or an exclusive pastoral lease;

e) a residential lease;

f) a community purpose lease;

g) a lease dissected from a mining lease and referred to in s.23B(2)(c)(vii) of the Native Title Act 1993(Cwlth);

h) any lease (other than a mining lease) that confers a right of exclusive possession

i) a "previous exclusive possession act" as defined in s 23B of the NTA which is attributable to the State of South Australia and is not an "excepted act" as defined in section 36F of the *Native Title (South Australia) Act* 1994 (SA)

over particular land or waters.

1. Subject to paragraphs 4 and 5, the area covered by the application excludes any land or waters covered by the valid construction or establishment of any public work, where the construction or establishment of the public work commenced on or before 23 December 1996.

2. Subject to paragraphs 4 and 5, exclusive possession is not claimed over areas which are subject to valid previous non-exclusive possession acts done by the Commonwealth or the State of South Australia.

3. Subject to paragraph 5 below, where the act specified in paragraphs 1, 2 and 3 falls within the provisions of:

1) s.23B(9)- Exclusion of acts benefiting Aboriginal Peoples or Torres Strait Islanders;

2) s.23B(9A)-Establishment of a national park or state park;

3) s.23B(9B) - Acts where legislation provides for non-extinguishment;

4) s.23B(9C)- Exclusion of Crown to Crown grants; and

5) s.23B(10)- Exclusion by regulation

the area covered by the act is not excluded from the application.

4. Where an act specified in paragraphs 1, 2 and 3 affects or affected land or waters referred to in:

1) s47 - Pastoral leases etc covered by claimant application

2) s47A - Reserves etc covered by claimant application

3) s47B - Vacant Crown land covered by claimant application

the area covered by the act is not excluded from the application.

5. The area covered by the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.

6. Any areas of land or waters in relation to which all native title rights and interests have been surrendered under a registered Indigenous Land Use Agreement (ILUA) is specifically excluded from the application area, from the date of surrender.

7. All the words and expressions used in this Attachment have the same meaning as they are given in the *Native Title Act* 1993 (Cth), unless otherwise specified.

Persons claiming to hold native title:

As per Extract from the Schedule of Native Title Applications.

Registered native title rights and interests:

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

(a) The right to access and move about the application area;

(b) The right to hunt on the application area;

(d) The right to gather and use the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, stone and resin;

(e) The right to use the natural water resources on the application area

(f) The right to live, to camp and to erect shelters on the application area;

(g) The right to cook on the application area and to light fires for all purposes other than the clearance of vegetation;

(h) The right to share or exchange subsistence or other traditional resources obtained from the application area;

(i) The right to engage and participate in cultural activities on the application area including those relating to births and deaths;

(j) The right to conduct ceremonies and to hold meetings on the application area;

(k) The right to teach on the application area the physical and spiritual attributes of locations and sites within the application area;

(l) The right to maintain and protect sites and places of significance under traditional laws and customs on the application area;

(m) The right to maintain, conserve and/or protect significant ceremonies, artworks, songs cycles, narrative, beliefs or practices by preventing (by all reasonable lawful means) any activity occurring on the application area which may desecrate, damage, disturb or interfere with any such ceremony, artwork, song cycle, narrative, belief or practice;

(n) The right to prevent (by all reasonable lawful means) any use or activity within the area which under traditional laws and customs is unauthorized or inappropriate in relation to significant locations, sites or objects within the area or ceremonies, artworks, song cycles, narrative, beliefs or practices carried out within the area;

3) the rights described in paragraphs 2(b), (c), (d), (e), (f) and (i) are traditional rights exercised in order to satisfy personal, domestic and communal needs.

4) the native title rights and interests are subject to:

a) the valid laws of the State of South Australia and the Commonwealth of Australia; and

b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of South Australia.

[End of document]