

Registration Decision

Application name	Brenton Weetra & Ors and the State of South Australia (Nauo No. 2)
Name of applicant	Brenton Weetra, Pauline Branson, Cynthia Weetra-Buzza, Jody Miller
NNTT file no.	SC2016/003
Federal Court of Australia file no.	SAD188/2016
Date application made	21 June 2016
Date of last amendment	Proposed amended application filed 31 March 2017 Leave to amend granted 6 April 2017
Date of Reasons	13 July 2017

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: 6 July 2017

Lisa Jowett

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the Native Title Act 1993 (Cth) under an instrument of delegation dated 8 June 2017 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] The Registrar of the Federal Court of Australia (the Court) gave a copy of the Nauo No. 2 native title determination application (SAD188/2016) to the Native Title Registrar (the Registrar) on 23 June 2016 pursuant to s 63 of the Act¹. This triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A: see subsection 190A(1). Prior to my registration decision, the applicant was granted leave by the Court to amend the application. On 18 April 2017 pursuant to s 64(4), the Court gave a copy of the amended application to the Registrar.

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

[3] The Nauo No. 2 native title determination application was first made on 21 June 2016, however the applicant advised that it would amend the application, requesting that I defer my consideration under s 190A. The area covered by the application when it was first made partially overlapped with the area covered by the conditionally determined Barngarla Native Title Claim (SAD6011/1998). The application was amended to reduce the area and thereby remove the overlap. It is the amended application that is the subject of these reasons and I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply. I have reached the view that the claim in the application must be accepted for registration and this document sets out my reasons, as the delegate of the Registrar, for my decision not to accept the claim for registration pursuant to s 190A of the Act.

Application overview and background

[4] The area covered by the application falls on the southern tip of the Eyre Peninsula, south of Port Lincoln and includes islands off this coast in the Spencer Gulf. It is bounded to the west by the Nauo Native Title Claim made in 1997 and appears to be brought on behalf of the same group described in this application. To the north, the claim is bounded by the Barngarla Native Title Claim, as referred to above, the subject of a conditional determination by the Court on 23 June 2016².

Information considered when making the decision

[5] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.

¹ 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.

² *Croft on behalf of the Barngarla Native Title Claim Group v State of South Australia (No 2)* [2016] FCA 724 (*Croft*).

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

[6] As required by s 190A(3)(a), I have had regard to information in the amended and original applications. I have also considered documents provided to the Registrar as additional material on 17 August 2016 and 4 May 2017:

- anthropological notes and map of significant places, Nauo No. 2 native title determination application area, [Name Removed], 17 August 2016;
- claimant statements made in 2011 by Pauline Branson, Cynthia Weetra Buzza, [Name Removed], [Name Removed], Jody Joseph Miller and Brenton Weetra.

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

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

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

[8] The State of South Australia (the state government) has not provided any submissions in relation to the application of the registration test.

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

[9] I have also considered information contained in an overlap analysis and geospatial assessment by the Tribunal's Geospatial Services dated 18 April 2017 (the geospatial report).

Procedural fairness steps

[10] As noted above, I have considered additional material provided by the applicant on 17 August 2016 and 4 May 2017. On 17 May 2017, the state government was advised that I would be relying on this information in my consideration of application for registration and provided the opportunity to make any submissions in relation to the material. On 22 May 2017, the state government wrote to say that it had reviewed the additional material for the purpose of registration and did not wish to make a submission in relation to it. This concluded the procedural fairness processes.

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

[11] In assessing the Nauo No. 2 application against s 190B(2), I am required to be satisfied that the information provided by the applicant for the purposes of ss 62(2)(a) and 62(2)(b) is sufficient for the particular land and waters, over which native title rights and interests are claimed, to be identified with reasonable certainty. In reaching the required level of satisfaction, it is to the terms of the application itself that I am to direct my attention—*Attorney General of Northern Territory v Doepel (2003) 133 FCR 112 (Doepel)* at [16] and [122].

Description of the area covered by the application

[12] Schedule B describes the application area, consisting of three parts, as all land and waters within the external boundaries of a metes and bounds description, referencing topographic features, the mean sea level and coordinate points, (referencing Geocentric Datum of Australia 1994 (GDA94), shown to six (6) decimal points).

[13] Unlike the original application, the amended application provides no description of those areas not covered by the application. That is, in amending the description of the external boundary, Schedule B does not include any general exclusion statements or any specific areas excluded from the claim that would allow the internal boundaries of the application area to be identified.

[14] Schedule C refers to Attachment C which contains a black and white copy of a map prepared by Geospatial Services; titled 'Nauo No. 2', dated 28 September 2016. The map includes: the application area depicted by a bold outline, abutting the Barngarla determination area depicted by a stippled area, topographic background and commencement point, scalebar, coordinate grid and locality map, notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[15] The original application included a small area of overlap along its northern boundary with the southern boundary of the Barngarla determination. On my bringing this to the applicant's attention, the applicant's representative advised the overlap was not intentional and was to be considered an error in the drafting. The application amends the description of the external boundary of the area covered by the application and is made for the sole purpose of removing the area of overlap with the determined area. No amendment has been made to the internal boundaries of the area covered by the application.

[16] In the Tribunal's reconsideration under s 190E(1) of the Jabiru Township claim (NTD6027/98)³, then Deputy President Sosso found that 'the application should be read to include the original application in those instances where the relevant part of the original application is not amended by the amended application. Such an approach is consistent with the non-technical and beneficial manner in which the registration requirements of the Act have been interpreted by the Full Federal Court in *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317—at [108].

[17] DP Sosso found in relation to the procedural requirement at ss 190C(2) and 62(2)(b):

A beneficial interpretation should be given, such that a slip of the type that appears in this matter, is not read in a way that would otherwise be fatal to the registration of the claim. Accordingly when reference is made to the "claimant application" in s. 62(1) it is to the totality of the application or applications filed with the Court. Where an amended application does not amend parts of the original application, then regard can be had to the information and material in that original application when assessing the extent to which the amended application has met the requirements of s. 62—at [106].

³ 11 November 2010. In this matter, the delegate was not satisfied the application contained all of the details and other information required by s 62(1)(b), that is, the application was not accompanied by a map showing the boundaries of the area covered by the application. On reconsideration, Deputy President Sosso reached a different conclusion, finding that '[t]he extent to which the amended application meets the requirements imposed by s. 62 should be assessed in conjunction with the unamended parts of the extant original application'—at [104]. On this basis he was satisfied that the application contained all details and other information required by s. 62(2)(b)—at [105].

[18] The amendment to the external boundary of the claim area is intended to remedy a technical error which caused an inadvertent overlap with an adjacent (yet to be finalised) determination, from which a failure to be accepted for registration would flow. A non-technical and beneficial consideration is my preferred approach in this instance. In my view, my consideration and assessment can be made in conjunction with the original application and is consistent with DP Sosso's findings.

[19] On the basis of the above views, I have read the amended application to include the original application and I refer to Schedule B, paragraphs 1-6 of the original application which provide a number of general exclusion clauses. The statements at each paragraph are sufficient to offer an objective mechanism by which to identify areas that may fall within the categories described. Schedule B of the amended application provides a technical description of the external boundaries of the claim area. Together with the map at Attachment C, these two attachments provide information in relation to the external boundaries of the area covered by the application which allows me to be reasonably certain of the location of those boundaries on the surface of the earth. Further, the geospatial report makes the assessment that the description and the map are consistent such that the area covered by the application is readily identifiable. I agree with that assessment.

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

[21] 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.

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

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

[23] Carr J in *State of Western Australia v Native Title Registrar* (1999) 95 FCR 93 (*Western Australia v Native Title Registrar*) was of the view that 'it may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently'—at [67].

[24] The native title claim group is described at Schedule A as follows:

Under the traditional laws and customs of the Central Lakes cultural region the Nauo People comprise a group of those Aboriginal people, who hold in common the traditional laws and customs that are associated with Nauo Country because of:

- (a) descent from a Nauo apical ancestor; or
- (b) an affiliation with Nauo Country through a parent or grandparent; or
- (c) birth on or near Nauo Country;

AND

- (d) a long-term association with the Nauo Country; and
- (e) traditional geographic and spiritual knowledge of the Country; and
- (f) identifies as a Nauo person; and
- (g) is identified as a Nauo person by other members of the claim group; or

A person is considered to be descended from a Nauo apical ancestor where that person is 'raised up' by a biologically descended Nauo Person. 'Raising up' includes assuming the responsibilities of a parent and guardian, and raising the person in the traditions of Nauo law and culture.

Under Nauo traditional laws and customs, Nauo People are related by means of a traditional principle of descent to the following apical ancestors:

Mary, a Nauo woman born c. 1840s, and who was the mother of Henry Weetra is acknowledged as an apical ancestor for the Nauo #2 Native Title claim.

Henry Weetra, born c.1869, and his known wife Eliza Goldsmith. He is acknowledged as an apical ancestor for the Nauo #2 Native Title claim. Henry and his partner Eliza had 13 children.

Essie Weetra, born 16 March 1891 is acknowledged as an apical ancestor of the Nauo #2 Native Title claim

[25] In my view, the description of the native title claim group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in that group. I understand that membership of the native title claim group is regulated under Nauo traditional laws and customs by the principles listed upper most of the description – descent from a Nauo ancestor(s), or affiliation with Nauo Country through a parent or grandparent, or birth on or near Nauo Country. Additional to these principles, there is a requirement for long term association with Nauo Country, geographic and spiritual knowledge of Nauo Country and for members to identify and be identified by others as a Nauo person. The description names the apical ancestors through which members of the native title claim group claim descent.

[26] It may be that some factual inquiry is required to establish a person's descent from any of the named ancestors or compliance with the other principles for membership, but that would not mean that the group has not been sufficiently described.

[27] 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.

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

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

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

- 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 recognised, the nature and extent of the native title rights and interests claimed in relation to the application area are the non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs being:
 - (a) the right to access and move about the 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 resources or other traditional resources obtained from the application area;
 - (i) the right to engage and participate in cultural activities and conduct traditional pursuits on the application area;
 - (j) the right to teach on the application area the physical and spiritual attributes of locations and sites within the application area;
 - (k) the right to maintain and protect sites and places of significance under traditional laws and customs on the application area;
 - (l) the right to maintain, conserve and/or protect significant artworks, song cycles, narratives, beliefs or practices by preventing (by all lawful means) any activity occurring on the application area which may desecrate, damage, disturb or interfere with any such artwork, song cycle, narrative, belief or practice;
 - (m) 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;
 - (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, or communal needs.
- 4) The native title rights and interests are subject to:
 - a) the valid laws of the State of South Australia and the Commonwealth of Australia;

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.

[30] I am of the view that the native title rights and interests claimed can be ‘properly understood’. I understand that the application claims possession, occupation, use and enjoyment to the exclusion of all others only in those areas where it can be recognised, and claims the listed non-exclusive rights where the exclusive right cannot be recognised. I am therefore satisfied that the description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

[31] 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

[32] The application satisfies the condition of s 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s 190B(5), as set out in my reasons below. I have considered each of the three assertions set out in the three paragraphs of s 190B(5) in turn before reaching this decision.

[33] In *Doepel* (and this was approved by the Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [82] to [85]), Mansfield J stated that:

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

[34] The decisions of Dowsett J in *Gudjala People # 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) also give specific content to each of the elements of the test at ss 190B(5)(a) to (c). The Full Court in *Gudjala FC*, did not criticise generally the approach that Dowsett J took in relation to these elements

in *Gudjala 2007*⁴, including his assessment of what was required within the factual basis to support each of the assertions at s 190B(5) and his approach in *Gudjala 2009* was in accord with this.

[35] In respect of the nature of the material that comprises the factual basis for the claim made in the application, the Court has provided that:

- 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—*Gudjala FC* at [92].
- The Registrar is not to consider or deliberate upon the accuracy of the information/facts asserted—*Doepel* at [47].
- The Registrar is to assume that the facts asserted are true, and to consider only whether they are capable of supporting the claimed rights and interests. That is, is the factual basis sufficient to support each of the assertions at ss 190B(5)(a) to (c)—*Doepel* at [17].

[36] The Full Court in *Gudjala FC* held that a ‘general description’ (as required by s 62(2)(e)) could be of a sufficient quality to satisfy the Registrar for the purpose of s 190B(5)—at [90] to [92]. However ‘the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality’—*Gudjala FC* at [92].

[37] Further, Dowsett J later held in *Gudjala 2009* that the asserted factual basis should provide more than mere restatements of the claim:

... it would not be sufficient for an applicant to assert that the claim group’s relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning that pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case—at [29].

[38] The above authorities establish clear principles that guide the Registrar when assessing the sufficiency of a claimant’s factual basis against the particularized assertions at s 190B, a summary of which precedes my consideration of each of the sub conditions.

The area covered by the application

[39] The additional material provided by the applicant describes the area covered by the application as:

The application area is on the southern tip of Eyre Peninsula and includes its most southerly mainland points, Cape Carnot, Cape Wiles, West Point and Cape Catastrophe. While much of the land has been developed, extensive uncleared areas remain with a generally coastal vegetation of low shrubs, mallee and eucalypts. These are particularly evident in the south, inland from Capes Carnot and Wiles and to the east in Lincoln National Park. Sizeable areas of white dune cover the region. The southern coast faces the Southern Ocean which is frequently subject to high energy waves and winds. Port Lincoln Proper Bay and Boston Bay closer to Port Lincoln however are sheltered. Sleaford Mere, a shallow saline lake is the other significant body of water in the area.

⁴ See *Gudjala FC* [90] to [96].

There are a number of islands in the application area with Parts Two and Three consisting wholly of islands and their adjacent waters—at p.1.

[40] The north western boundary of the area covered by this application abuts the southern boundary of the Nauo Native Title Claim (SAD6021/1998). The application refers at Schedule H to passages in *Croft* that support the proposition that Nauo country extends east of the area covered by the Nauo application made in 1996 and south of Port Lincoln. Justice Mansfield in his determination of the Barngarla claim stated:

in my view it should be accepted that, on the balance of probabilities, at the date of sovereignty, people who identified as belonging to the Barngarla grouping were the primary inhabitants of the entire claim area, including the area south of Franklin Harbour, *but excepting the area south of Port Lincoln*—at [709], emphasis added.

[41] and

...Nauo people held core rights in country just to the south and ... across to the west of Port Lincoln ... (T1640, line 15) I agree with and endorse that assessment—at [702].

[42] The additional material also points to the relevance of Justice Mansfield’s observation, that:

Schurmann’s very specific declaration [is] that the southern coast of Port Lincoln Proper Bay is Nauo country. Proper Bay is the bay immediately to the south of Port Lincoln and is to the north of the Lincoln National Park (the Jussieu Peninsula) at the south eastern tip of the Eyre Peninsula. (Mansfield, 2015:paragraph 683)—at p. 5

[43] Many of the areas, places and sites referred to in the factual basis material for the Nauo No. 2 application fall within the area of the adjacent Nauo Native Title Claim. My consideration of the factual basis material and the supporting detail provided by the claimant statements leads me to understand that although these areas are not located within the Nauo No. 2 application area, they have significant linkages to locations within it. This is particularly so of the Coffin Bay area on the western side of the Jussieu Peninsula. In my view, it is reasonable to accept evidence of the Nauo people’s current and previous association and the acknowledgement and observance of traditional laws and customs in respect of such proximate and adjacent areas given that they fall within acknowledged Nauo country.

Information considered

[44] I have had regard to the following factual basis material:

- Schedules F and G of the application;
- anthropological notes and map of significant places, Nauo No. 2 native title determination application area, Robert Graham, 17 August 2016;
- claimant statements of Pauline Branson, Cynthia Weetra Buzza,[Name Removed], [Name Removed], Jody Joseph Miller and Brenton Weetra.

Reasons for s 190B(5)(a)

[45] This subsection requires that I be satisfied that the factual basis is sufficient to support the assertion that the native title claim group has, and its predecessors had, an association with the area of the application. Specific to the factual basis for the claim made in this second Nauo application, it is not necessary for it to support an assertion that all members of the native title claim group have

an association with the area all of the time, however, it is necessary to show that the claim group as a whole has an association with the area—*Gudjala 2007* at [51] and [52].

[46] Further, Dowsett J also observed:

Similarly, there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty—at [52].

[47] Attachment F refers to sites and areas located within and proximate to the area covered by the application and the additional material maps key sites and locations contained within the claim area. They are areas of both previous and current association for the native title claim group. The claimant statements show extensive knowledge of and association with many areas and sites in the adjacent Nauo claim area. In combination this material supports the context in which the native title claim group and its predecessors' association with Nauo country exists.

Association of the predecessors of the native title claim group with the application area

[48] Attachment F makes the assertion that Nauo ancestors had an association with the claim area and this is evidenced in early historical and ethnographic accounts which formally locate Nauo people in the area covered by the application at the time of early European settlement. For example:

- Clamor Schurmann, Deputy Protector of Aborigines at Port Lincoln, 1840s - defining 'nauo' or 'nawo' as the "national name of the native tribe inhabiting the country about Coffin's Bay' (20kms north of the claim area); noted the dialectical differences between the Nauo and the Parnkalla (Barngarla) — *The Nauo is spoken in the southern and western parts of this district, and seems to deviate from the Parnkalla by a broader and harsher pronunciation and different inflections or terminations of the words, verbs as well as nouns; many words, however, are totally different.*
- George Angas, a colonial artist who visited South Australia in the early 1840s recorded association of Nauo people with the area around Coffin Bay.
- Howitt (1904), Tindale (1927, 1940, 1974) recordings of the boundaries of Nauo country included the recognition by adjacent groups of Nauo's interests in connection to the Port Lincoln area.
- Tindale's knowledge of the extent of Nauo country was informed by adjacent groups' recognition of Nauo people's interests in and connection to the area covered by the application.
- Tindale's hand drawn 1928 map of the peninsula's Aboriginal groups shows the present application area as wholly within the Nauo area.
- Nauo People were the occupants of the region in which the claim area falls has been recorded by missionaries, historians and linguistic researchers—at 2.2-2.3.

[49] Attachment F includes a summary of the traditional laws and customs under which the rights and interests claimed in the application exist, including reference to historical records of Nauo people exercising their rights in relation to Nauo country. For example, Nauo people were observed by Schurmann and others – that they accessed and moved about the area now covered by the application – hunting mammals and birds, fishing and relying on other marine resources for sustenance, constructing and maintaining fish traps, many of which are on the archeological record and found in the claim area; gathering and utilizing plants and other vegetation. Nauo people were recorded as camping and remaining in the 'neighbourhood' of water resources such as creeks, water holes and isolated wells, many of which also had mythological and ritual significance.

[50] The birth place and areas of association of two of the named ancestors, Mary and Henry Weetra are detailed in Attachment F: Mary was recorded by Tindale as from Streaky Bay (on the far west coast of the Eyre Peninsula) and her son Henry Weetra was born at Weetra Station in the south west of the Eyre Peninsula (in the adjacent Nauo claim area, 25 km north-west of Venus Bay). Henry is said to have 'remained close to the Nauo No. 2 application area, living at times in the Poonindie mission, just north of Port Lincoln'—at 2.5. Key to the native title claim group's connection and association with Nauo country are the factors that regulate Nauo identity, listed in the description of the native title claim group. I am satisfied that sufficient supporting material is provided by the five claimants who claim direct descent from Henry Weetra who is their great grandfather and the source of their affiliation to Nauo country.

[51] The claimant statements have been compiled in 2011, well before the making of this second Nauo claim, and information that goes to the association of the predecessors of the native title claim group with the particular area it covers is scant. Therefore, the majority of the locations and sites referred to in the application and claimant statements show an association of the predecessors of the native title claim group with areas predominantly outside of the boundaries of the area covered by this application. However, the additional material provided by the applicant outlines a series of sites within and adjacent to the Nauo No. 2 claim area based on recent research and interviews with Nauo people. A map representing these places is 'intended to convey the spread of Nauo places across the application area and country adjacent to it' and is 'reflective of such things as topography, specifics of the storylines and distribution of resources'—at p.4. This material addresses more specifically areas within the claim boundaries of historical association and continuing significance to the native title claim group – the peninsula now covered by the Port Lincoln National Park, Neptune, Gambier and Thistle Islands, Cape Catastrophe, Memory Cove. Together the text and map identifies places, sacred sites associated with myths and beings or having 'religious potency' which 'are in some way powerful and/or dangerous'. Sites that are resource rich and foraging, hunting or camping places are also identified:

- Port Lincoln township marks the location of an historic Aboriginal camp;
- the important and restricted men's only site on Northside Hill just outside the town and to the immediate north of this application's boundary, (and overlooking Port Lincoln Proper Bay);
- archaeological evidence of Aboriginal visitation and habitation of the islands;
- Jody Miller's family's oral history includes accounts of accessing the islands and Boston Island in particular;
- early material showing that the islands here, in common with other parts of South Australia were of spiritual significance to Nauo people;
- Cape Catastrophe features in Nauo mythology passed down through the generations;
- the land behind Memory Cove has known fresh water sources, sheltered camp sites and displays typical archaeological campsite debris;
- the Uley Sand Dunes (immediately west of the application area) form part of Nauo mythology, that of the huge fire that came from the sea, also recorded by Schurmann.

[52] The significance of these areas is supported by the stories and customary knowledge held by, and passed onto, the native title claimants by their predecessors, as evidenced in the statements of Brenton Weetra and Jody Miller. For example, Brenton Weetra knows 'that the land is Nauo land. My father's spirit comes from the land and roams around the land. I can feel the spirit of my ancestors'—at [27].

[53] The assertion is that Nauo claimants have an intimate and continuing knowledge of the traditional laws and customs that connect them to their country, including the area covered by this application, which has been passed down to them from their parents and grandparents in a continuous chain of knowledge from at least the time of European settlement. Rights and interests in relation to Nauo country have been acquired by Nauo claimants through their descent from acknowledged Nauo ancestors, and through the acknowledgement and observance of laws and customs they have been taught to them by preceding generations of Nauo people—Attachment F at p.1.

Current association of the native title claim group with the application area

[54] Attachment F asserts that the native title claim group's current association with the claim area is intricately linked to their predecessors' association:

Descent group membership provides a Nauo person with kin-group identity, and also the means of identification with country: it is able to "confer a particular kind of association" with a specific locality, or region (Sutton 2003:213). For the Nauo people this includes the present application area (but is not restricted to it, for example as can be seen from the historical material, the adjacent Coffin Bay area is also highly significant)...—at 4.1.

[55] This descent-based connection to, and association with, Nauo country is repeatedly demonstrated throughout the claimant statements. The claimant's state that all of their cultural and traditional knowledge in relation to the land and waters of Nauo country is rooted in the regular access and movement of their predecessors throughout their country. This is said to form the basis of the continuation of traditional hunting, foraging, gathering and fishing practices, and religious, ceremonial activities in the coastal and inland areas covered by the adjacent Nauo application, as well as around much of the Nauo No. 2 claim area—Attachment F at 4.2.1. Geographically speaking:

Areas visited regularly as noted in various affidavits include: Bascombe Well National Park, Blackfellows Point, Coffin Bay, Cowell, Dutton Bay, Elliston region, Farm Beach, Gallipoli Bay, Greenly Beach, Kiana, Kellidie Bay, Lake Greenly, Lake Malata, Lake Tungketta, Little Douglas, Lock, Mount Dutton, Mount Wedge, Point Drummond, Port Kenny, Port Neil, Seal Comer, Sheringa, Talia and Yeelanna. Port Lincoln and Lincoln National Park are included as has been mentioned elsewhere. While some of these claimants may live just outside the claim area, they make regular visits to it—Attachment F at 4.2.1.

[56] The additional material details significant sites within the claim area identified to the researcher by Nauo claimants, including mythological story places (Eaglehawk, Native Cat), restricted men's, sites of water sources and historic campsites. These places continue to be visited and cared for by members of the native title claim group – at p. 6.

[57] Each of the claimants speak in their statement of travelling and camping extensively through the claim area and adjacent Nauo country. They did this when they were children accompanied by their parents, grandparents and other elders. They now take their children and grandchildren to camp on Nauo country teaching them 'to live off the land, catching kangaroo, emu and goanna, continuing the traditional practice of hunting 'paru'".

[58] Cynthia Weetra refers to camping on the coast as well as inland with her parents, her own children and grandchildren, depending on the seasons and what food was available - Mount Wedge,

Sheringa and Coffin Bay, Lake Tungketta, and in the Bascome Well National Park (all proximate to the claim area). She knows the areas where food is abundant, where the elders have camped in the past, important sites and the stories for certain areas. She knows the places where she is not allowed to go—at [8], [10]-[11] and [17].

[59] Jody Miller was born and raised in Port Lincoln and worked for many years there, his siblings and other family members reside there. He was told by his father that Nauo country extends from the Port Lincoln area up to around Elliston. As a boy he travelled extensively ‘on the land which my father and other Nauo people have told me is Nauo land’, he was taught about the land by his parents, that he belongs to the land, he feels the presence of his ancestors—at [10].

[60] Jody Miller speaks of his association with areas in the adjacent Nauo Native Title Claim area at Port Drummond, Sheringa, Coffin Bay, Sleaford Bay, Mount Dutton, Sheringa, Blackfellows Point, Gallipoli Bay and Mt Dutton area. In these places he continues to camp, hunt and fish, he checks and maintains the fish traps in these areas. He was taught by his father how to use and manage the water resources in Nauo country. He knows of and visits significant sites on Nauo country, he participates in site clearance surveys because he has this knowledge—at [24]-[26]. An account of Jody Miller’s association with the Lincoln National Park, Jessieu Peninsula and islands is given in the additional material:

Went there with [my] parents hunting kalta (sleepy lizards), rabbits. [Went] Right down to the bottom. Remember going down at about ten years of age with Mum and dad, brothers and sister. [They] would talk about it as being their country. Went on welfare trips and Church trips. Continue to this day. And my brothers’ ashes [are] down there too. Camping down there both sides [of the National Park peninsula]. Brothers and sisters in Port Lincoln still go down there hunting and fishing—at p.9.

[61] Consistent with the Aboriginal practice of wishing to die and be buried on or near their traditional country, members of Jody Miller’s family are buried at Port Lincoln. The additional material states that this is fundamental to the claim group’s close association with the land, and sense of belonging to it.

Consideration

[62] In *Gudjala 2007* Justice Dowsett considered that in assessing the factual basis material, it was necessary for the Registrar to address ‘the relationship which all the members claim to have in common in connection with the relevant land’—at [40]. Further to this, the facts alleged must ‘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)’—at [39]. The factual basis material should therefore provide information that pertains to the identity of the native title claim group, the predecessors of the group and the nature of their association with the area of the application.

[63] In my view, the material before me shows cumulatively an association between the whole group and the whole area of the claim. The claimant statements show a long and continuing association with Nauo country as a whole, including their interconnected spiritual affiliations with the area of the application. Their statements provide examples of the claim group’s current association with Nauo country, including reference to the association with claim area of their children, grandchildren, aunts, uncles and other members of the claim group. Each attest to how and where their parents, grandparents and great grandparents were born, where they lived, worked and

travelled. They document that their predecessors travelled all over their country—living and working in the towns in and proximate to the claim area, conducting Law business, camping, hunting and teaching and learning Nauo stories and cultural knowledge—in exercise of those rights and responsibilities connected to their country and held under their traditional laws and customs.

[64] The additional material contains detailed references to places that fall within the boundaries of the claim area – places associated with Nauo dreaming stories, the births and deaths of ancestors and creation spirits, the locations of significant sites. With this information as well as that of the ethno historical record in mind, in my view it is reasonable to make the inference that Nauo people have an intergenerational association with the area covered by this second Nauo application. This association appears to be a closely interlinked connection with adjacent Nauo country and to have existed since at least the time of first European contact.

[65] In my view, there is a link between the current claim group's and its predecessors' association with the application area to be found in the application, additional material and the claimant statements. The information demonstrates the native title claim group's connection to the land and waters of the application area through descent affiliation to Nauo country. In this way, it is clear that this current association has its origins in the preceding generations' association with the area.

[66] For these reasons I am satisfied that the native title claim group has and its predecessors had an association with the area.

Reasons for s 190B(5)(b)

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

[68] In *Gudjala 2007*, Dowsett J considered that the factual basis materials for this assertion must demonstrate⁵:

- that the laws and customs currently observed by the claim group have their source in a pre-sovereignty society and have been observed since that time by a continuing society—at [63];
- the identification of a society of people living according to a system of identifiable laws and customs, having a normative content, which existed at the time of sovereignty—at [65] and see also at [66]; and
- the link between the claim group described in the application and the area covered by the application, 'identifying some link between the apical ancestors and any society existing at sovereignty'—at [66].

[69] In the context of the registration test (and explicitly the task at s 190B(5)(b)), there must be factual material capable of supporting the assertion that there are 'traditional' laws and customs acknowledged and observed by the native title claim group, and that they give rise to the claimed native title rights and interests—*Gudjala 2007* at [62] and [63]. In my view, there is sufficient factual account in the application, additional material and claimant statements to support the proposition, that under the traditional laws and customs of the claim group, there exist rights and interests that relate to the land and waters of the area covered by the application.

⁵ This was not criticised by the Full Court in *Gudjala FC* (at [71], [72] and [96]).

The relevant society and traditional laws and customs

[70] Attachment F to the application asserts that the Nauo native title claim group is 'a distinct and identifiable community group, and are part of the broader society that comprises the Central Lakes Cultural region, an area which encompasses the western region of the Eyre Peninsula to the far north-east of South Australia and beyond'—at 4.1. That is, by reference to anthropological theorists, the factual basis asserts that Nauo people 'share cultural commonalities and adhere to the same system of laws and customs; are 'organised in the same manner' as others belonging to the Central Lakes Groups. Members of the native title claim group understand their ancestors were members of a discrete community – and part of a wider 'cultural region' – with its shared laws and customs and a distinct language, and whose members identified themselves as Nauo people. Nauo claimants are said to refer constantly to Mary and Henry Weetra as the basis of their unique Nauo identity⁶.

[71] The factual basis for the claim relies on the ethnographic observations of Schurmann (referred to above) to support the 'identification of a relevant pre-sovereignty society [and] its laws and customs relating to rights and interests in land and waters'⁷:

Schurmann presented clear evidence of the existence of a distinct Nauo community based on his detailed observations. He recorded information about laws, customs and practices relating to social organisation, initiatory rites and practices, religious beliefs and ritual ceremonies, respect and deference to older persons in the absence of formalised structures of authority, and the avoidance of naming deceased persons. He also recorded information about laws and customs associated with gathering, hunting and exchange—at 4.1.

[72] It is asserted that 'clear links can be demonstrated between the stories recorded by Schurmann (and others) and living Nauo [people]'. It is as the direct descendants of those Aboriginal persons who were in occupation of the application area, and areas surrounding the application area, at the time of sovereignty, that members of the native title claim group are said to acknowledge and observe traditional laws and customs:

This acknowledgement of identity plays an important role in Nauo society, for example, it regulates marriage between people, so that the concept of 'marrying too close' does not occur, and demonstrates a contemporary adaptation of the moiety system that Schurmann observed in the 1840s—at 2.5.

[73] It is on this basis that the application asserts that the Nauo No. 2 Native Title claimants continue to acknowledge and observe traditional laws and customs that have been passed down to them from generation to generation by their forebears since prior to the assertion of British sovereignty. These traditional laws and customs include the rights and responsibilities associated with the claim area which have been acquired through an association with the claim area from ancestral descent—at 4.1.

Traditional laws and customs

[74] Attachment F relies on Schurmann's documentary record about Nauo laws, customs and practices relating to social organisation, initiatory rites and practices, religious beliefs and ritual ceremonies, respect and deference to older persons, the avoidance of naming deceased persons and

⁶ See statements of: Pauline Branson at [2]; Cynthia Weetra Buzza at [2]; David Buzza at [3]; and Brenton Weetra at [5].

⁷ *Gudjala 2009* at [69].

laws and customs associated with gathering, hunting and exchange of resources—at 2.1. Detailed information is also provided in relation to specific traditional laws and customs, including and their normative content:

- recognition of common ancestors as the basis for claim group membership and rights and interests in land and waters;
- acquisition of rights and responsibilities through a parent or grandparent with a connection to the claim area;
- controlling the access of others to the land and waters of the claim area;
- site visits to, maintenance and protection of the land and waters of the claim area;
- participation in ritual and ceremonial observances and the transmission of information relating to sites and associated ritual and ceremonial observances; and
- customs relating to hunting, fishing, gathering and foraging, in particular, appropriate practices relating to food consumption, distribution, sharing and trade—at 4.

[75] Cynthia Weetra Buzza notes in her statement how "the practice of deference and respect to elders, and their authority" was instilled in her by her father and grandfather, and that she has continued this practice with her children and grandchildren—at [20]. [Name Removed] describes how respect and deference to older authoritative persons was taught to him by his uncles, and how this was strictly enforced as part of traditional Nauo law and custom—at [10]. Jody Miller has also asserted that he respects the views of older people, in particular senior Nauo man Brenton Weetra, and seeks their permission to visit certain areas of land—at [23] and [26]. Brenton Weetra states that he is an initiated man, and because of his ritual status and authority is consulted by other people, both Aboriginal and non-Aboriginal, in relation to access to Nauo land—at [8] and [24]-[27].

[76] The claim area contains significant sites to the native title claim group and details are provided in the additional material about their associated mythologies and their role in activities such as camping, hunting and foraging for resources. In support of these assertions, the material refers to Brenton Weetra's statement:

Nauo law is based around the stories, songs and dances passed on by our creative ancestors. Because of my senior law status I know of a number of important stories that exist on Nauo country about the mythological ancestors who created important features in our landscape. These mythologies include the Eaglehawk story, the wild cat story, Kangaroo story and Sleepy Lizard (Kalta).

Many aspects of these stories are restricted, either on the basis of gender or ritual status so I cannot say too much ...

I was told that Nauo law has been practiced in places, for instance near Whaler's Way near Port Lincoln ...—at [11]-[13].

[77] The material asserts that a system of religion still exists and ritual practices continue, citing Schurmann's observations of the religious, ritual practices and beliefs of Nauo people and the gender restrictions on some aspects of these beliefs and practices. Pauline Branson describes how such practices continue today, that knowledge of religious and site information and associated rituals may be gender restricted, that ritual practices and information has been transmitted to her orally by upper generations of Nauo people and continue to be passed down to future generations of Nauo people—at [6]-[13].

[78] Stories specific to the Nauo mythology were recorded by Schurmann in the 1840s: those associated with the natural features in the Cape Catastrophe area and Memory Cove (within the

claim area) we well as others in the Coffin Bay area (to the north west) and with the Uley Sandunes. Jody Miller knows the mythological stories relating to the Nauo claim area, having been taught these by senior Aboriginal men such as his father – stories of mythological ancestors, creation stories and those that relate to the geographical formations of the landscape—at [18]-[20]. He has knowledge of the traditional laws and customs that relate to particular significant sites, including those with gender restrictions—at [21]-[22].

Consideration

[79] The application and additional material provide, in my view, sufficient support for the existence of a normative society at sovereignty in respect of the claim area, one defined by recognition of laws and customs, and from which the claim group's current traditional laws and customs are derived—*Gudjala 2009* at [66]. The statements made by the claimants demonstrate an inter-generational transmission of traditional Nauo law and custom. Together with the information at Attachment F, there are examples that illustrate aspects of the group's traditional law and custom, in respect of the area of the application, pertaining to family and ancestors, rules of affiliation to country, important places and stories, hunting and gathering and the passing on of traditional and cultural knowledge.

[80] I am satisfied that the material provides a sufficient factual basis for the assertion that there exist traditional laws acknowledged and customs observed by the native title claim group and that these give rise to the native title rights and interests it claims.

Reasons for s 190B(5)(c)

[81] This subsection requires that I be satisfied that there is sufficient factual basis to support the assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs. In order for the Registrar to be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses those matters outlined by Dowsett J in *Gudjala 2007* at [63], [65] and [66] (as summarised above).

[82] The factual basis material together with the claimant statements assert the continuity of the native title claim group's traditional laws and customs. The statements illustrate the application's assertion that Nauo people 'continue the traditional ways of education and socialisation in many aspects of their culture, through generational transmission via oral and practical instruction'—Attachment F at p.10. Further:

Claimants who are knowledgeable about the land, its resources and meanings have had this knowledge passed down to them by elders. This knowledge is fundamental to cultural traditions and contemporary identity.

....the continued importance of family in contemporary society is still fundamental to Nauo social life and identity, and family membership through biological descent or being 'grown up' by a Nauo person(s) are continuing expressions of traditional Nauo law and custom. Contemporary Nauo social organisation is characterised by a social system which comprises family kindreds of the sub-branches of what Sutton calls 'families of polity'. This is a "distinctive post-colonial Aboriginal social system", and a contemporary continuation of some key elements of traditional social organisation...—page. 11

[83] Attachment F states that members of the native title claim group continue to 'engage in practices associated with their traditional economy, evident in their foraging, hunting, and fishing

practices, utilising a significant number of natural resources for food'. Both Cynthia Buzza and [Name Removed] describe extensively their use of the plant and animal resources of Nauo country, the purpose of certain resources and where to find them having been taught to them by their parents and grandparents. Each of the claimant statements and the additional material relay the mythological stories passed down through the generations that traverse large tracts of surrounding country including the claim area. This contemporary knowledge and the practices associated with the claimants' access to and use to the land and waters of the claim area are said to demonstrate a continuation of what Schurmann observed and recorded in the 1840s—Attachment F at p. 9.

[84] The transmission of knowledge from ancestors and predecessors to the current generation is demonstrated in Jody Miller's statement:

As a boy I travelled on the land which my father and other Nauo people have told me is Nauo land ("the land") extensively. I was taught about the land by my parents. I feel that I belong to the land. I can feel the presence of my ancestors there.

As an adult I have continued to travel on the land extensively with other Aboriginal people, particularly my family. I camp out on the land, sometimes "in the scrub", sometimes in National Parks and Reserves—at [10]-[11].

[85] The native title claim group continues to acknowledge and observe the same system of law and custom as their predecessors, teaching it to their children and grandchildren. [Name Removed] refers to this pursuit of continuity in numerous places in his statement:

It is part of keeping Nauo culture alive to learn the protocols and teach them to your kids and grandkids as you have been taught. I have taught my children how to travel and utilise the resources of Nauo country just as I was taught. My children are able to live off the land by finding animals, plants and water to sustain themselves, whilst being aware of the protocols which they must adhere to and avoiding certain areas—at [28].

[86] In my view, the claimant statements and additional material sufficiently demonstrate that the native title claim group has continued in such matters as its cultural practices and use of the natural resources of the land and that this knowledge has been passed down from their ancestors and continues to be passed down to successive generations. It is through such intergenerational transfer that the claim group continues to acknowledge and observe the traditional law and custom of their ancestors in relation to the area of the application and the country by which it is encompassed.

Conclusion

[87] 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.

[88] Under s 190B(6) I must be satisfied that at least one of the native title rights and interests claimed by the native title group can be established, prima facie. I refer to the comments made by Mansfield J in *Doepel* about the nature of the test at s 190B(6):

- it is a prima facie test and 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'—*Doepel* at [135].
- it involves some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'—*Doepel* at [126], [127] and [132].

[89] I have examined the factual basis for the assertion that the claimed native title rights and interests exist against each individual right and interest claimed in the application to determine whether prima facie, they:

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

Consideration

[90] In my view, as set out above at s 190B(5), the application provides a sufficient factual basis to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claimed native title rights and interests. What follows is my consideration of the rights and interests claimed in the application as to whether they can be prima facie established to exist under the native title claim group's traditional laws and customs.

Exclusive right

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.

Established

[91] The majority decision of the High Court in *Western Australia v Ward* (2002) 213 CLR 1; (2002) 191 ALR 1; [2002] HCA 28 (*Ward HC*) considered that '[t]he 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'. Further, that expression (as an aggregate) conveys 'the assertion of rights of control over the land' which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country'—at [89] and [93]. *Ward HC* is authority that, subject to the satisfaction of other requirements, a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be established, prima facie.

[92] I have also relied on decisions of the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths*) and *Banjima People v State of Western Australia (No 2)* [2015] FCAFC 171 (*Banjima*) which indicate that this right, to be established, must be accompanied by evidence that the practice of seeking permission to go onto another's country is grounded in a spiritual imperative that gives the practice normative force. This may be expressed by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury

to country'—*Griffiths* at [127]. In *Banjima*, the Full Court referred to these statements from *Griffiths* and held that 'controlling access to country, expressed by the need to obtain permission to enter under pain of spiritual sanction ... is readily recognisable as a right of exclusive possession'—at [38].

[93] Cynthia Buzza speaks of the permission protocols required to access Nauo country:

Under Nauo traditional law entitlement to Nauo country comes from being a descendent of Henry Weetra. It was, and remains, the case that other Aboriginal groups will seek permission from senior Nauo people if they want to come on to Nauo country, ie. to conduct ceremonies, take food or be involved in meetings—at [22]

[94] Jody Miller also speaks of the assertion of Nauo rights of control over their country:

All Aboriginal people have to respect other people's land. I know when I am on my land and when I am on other Aboriginal people's land. If I want to go to places on other people's land I seek permission from the old people to do so. I know that other Aboriginal people, and white people seek permission from Brenton Weetra before going to certain places on the Nauo land—at [28]

[95] The claimant statements speak about the traditional laws and customs that relate to the exclusive right. In addition to the above statements, they speak of the permission obligations on people who do not belong to Nauo country who wish to do things on country – they must seek the permission of Nauo elders and if they don't, it will make the spirits angry and can be dangerous for them. Members of the Nauo native title claim group are the only people who have the authority to speak for the claim area under traditional Nauo laws and customs—Brenton Weetra at [24].

[96] In my view, the right to exclusive possession can be established, *prima facie*, as it is sufficiently evidenced in the material before me that this claimed right exists under the traditional laws and customs of the native title claim group.

Non-exclusive rights

[97] The non-exclusive rights are framed by the statement that they are claimed over areas where a claim to exclusive possession cannot be recognized, and that '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'. The description of the claimed rights includes the statement that the non-exclusive rights at (b), (c), (d), (e), (f) and (i) are traditional rights exercised in order to satisfy personal, domestic, or communal needs.

(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 resources or other traditional resources obtained from the application area;

Established

[98] These rights are evidenced in the material before me, suggesting the rights exist under the traditional laws and customs of the native title claim group.

[99] The missionary Schurmann noted that Nauo people divided their food into two general classes, including "mai" to denote vegetable foods and plants, and "paru", referring to a variety of animal sources. Schumann also observed specific plant gathering and usage of natural resources such as pig-face, nondo-beans and various berries, and how the women used a grubbing stick as "their constant companion" in the search for resources. When on Nauo country Cynthia and other members of the claim group still continue the traditional practice of gathering 'mai', utilising digging sticks, an activity that was taught to her by her ancestors, and which she has taught her children and grand-children—at [13]-[16].

[100] The additional material refers to Shurmann's observation that Nauo are a coastal and fishing people and that this continues to be so is illustrated in the claimant statements, for example, Jody Miller states:

Fish are an important food source, and I was taught by my father, as he had been taught by older people, how to locate and catch fish. I was taught by my father to use a hand spear to catch butterflyfish but today we are using fishing rods and lines. Nauo people regularly catch salmon, butterflyfish, tommy ruffs and whiting. We collect abalone and crayfish—at [13].

[101] Cynthia Buzza speaks of camping as a child when the men would hunt for kangaroo, emu, wombat, hare or a sleepy lizard and 'the women would take us girls out looking for mai (food), we would get a stick and dig for sweet yams, and we would collect stinging nettles'—at [13]. Laws and customs in relation to hunting, fishing, the preparation of food, the use of plant resources and the importance of looking after country were instilled in her from a young age by her elders and which she now passes on to her own children—at [14]-[17].

[102] Brenton Weetra speaks of travelling all his life through Nauo land – camping with his predecessors, now with his children and grandchildren, sometimes 3 to 4 weeks at a time, often erecting shelters using the timber resources, hunting and eating kangaroo and goanna, gathering bush medicine, sourcing timber to make artefacts such as spears and boomerangs. He is mindful of the traditional custom of taking only enough resources for personal and family use. In the course of these activities he passes on the practice of informing and educating his children and younger members of the claim group about the importance and use of bush medicines, plant use and water resources. Brenton Weetra also continues to trade in economic resources with other Aboriginal people, for instance, the exchange of local wombat meat for kangaroo meat from the north of the state—at [14]-[22].

[103] The information in the application and the claimant statements, as referred to in my consideration of the factual basis material illustrates the inter-generational transmission of law and custom giving rise to the claimed rights and interests. Based on this information, I consider that the non-exclusive rights relating to accessing the application area, accessing and sharing and exchanging its resources are established on a prima facie basis. The information shows that the claim group camp and visit the area to hunt, fish and gather, teach about and protect their country's natural resources, significant places and objects. This material shows a history of access and that the access to and use of the area and its resources are subject to laws and customs that have a traditional quality.

[104] I consider that these rights can be established, prima facie.

(i) the right to engage and participate in cultural activities and conduct traditional pursuits on the application area;

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

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

Established

[105] These rights are evidenced in the material before me, suggesting they exist under the traditional laws and customs of the native title claim group.

[106] The claimant statements show that Nauo people continue to engage in and participate in the cultural and traditional activities passed onto them by their predecessors – many of which were described in the observation records of Schumann (as referred to above). Such activities and pursuits occur in exercise of their accessing the claim area and using resources and in the intergenerational transfer of traditional law and custom.

[107] Each of the claimant statements speak to being taught by their predecessors the boundaries of Nauo country, the locations of sites and their associated mythological stories which they now teach to their own children and grandchildren. Brenton Weetra is an initiated man, taught the law by old Nauo people and has a ‘special spiritual connection to Nauo country through his father and descent from Henry Weetra—at [8]-[10]. Brenton Weetra teaches his children about the rock holes, soaks and how to survive in the bush—at [20]-[21].

[108] Pauline Branson states that she is actively involved in the protection and maintenance of Nauo sites, stories and culture all her life, taking a role in the protection of women’s sites and stories—at [10]. Brenton Weetra also has the responsibility of protecting and maintaining places of importance on Nauo country – he speaks of the existence of such sites, their ritual status, the locations of and places where Nauo law has been practiced by preceding generations. He takes his children and grandchildren onto country to teach them the stories of such places, passing on information about their restrictions, care and significance for Nauo people—at [11]-[13].

[109] The material shows the native title claim group’s continuing adherence to obligations to country. Protecting and maintaining significant places and sites, participating in cultural activities and traditional pursuits and the teaching of the physical and spiritual attributes of their country are subject to Nauo traditional laws and customs which have been acknowledged and observed by Nauo people through the generations.

[110] I consider that these rights can be established, prima facie.

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

Established

[111] This right is evidenced in the material before me, suggesting it exists under the traditional laws and customs of the native title claim group. Whilst the protection of information and ritual

knowledge and practice is not a right in relation to lands and waters, in my view this right is framed in terms of maintaining and protecting the sites and locations on the land and waters of the application area to which such cultural knowledge is associated.

[112] The application and claimant statements consistently reference the mythological stories which depict the creation of the topographical features Nauo country (including within the area covered by the application). Brenton Weetra speaks of the importance of ritual narratives and song cycles to Nauo people and actively participates in the protection of the sites to which they relate, acknowledging and enforcing the physical and spiritual restrictions they impose on members of the claim group and others who are not Nauo—at [12]-[13]. He and Pauline Branson have the requisite knowledge and authority to maintain and enforce the confidentiality restrictions that will protect areas that have high cultural significance under Nauo traditional law and custom. Pauline Branson participates in heritage surveys to ensure that Aboriginal sites and the stories associated with them are protected – her statements illustrating that specific procedures and rules for conduct and action continue to be observed and enforced as part of a normative system with a basis in traditional law and custom—Attachment F at p. 22.

[113] I consider that this right can be established, prima facie.

(m) 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;

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

Established

[114] This right is evidenced in the material before me, suggesting it exists under the traditional laws and customs of the native title claim group.

[115] Attachment F asserts that such a right exists under those Nauo traditional laws and customs that relate to the controlling of access to Nauo country and people's participation in ritual and ceremonial observances over their land and waters—at p. 22. Interactions of this nature between Nauo and the neighbouring Barngarla group are evidenced in the early settlement observations and the historical record. The contemporary expression of this right is evidenced, for example, in Cynthia Buzza's descriptions of how other Aboriginal groups seek permission from or are accompanied by senior Nauo people to come onto Nauo country for ceremonial activities, gathering food, or attending meetings—at [22]. Brenton Weetra speaks of work area clearances and heritage survey activities which involve external researchers observing and recording traditional cultural practices and activities. He has the appropriate status under Nauo traditional law and custom to manage and control such access, and to determine what information may be revealed and recorded, and what may not—at [24]-[27] and [29]-[30]. and show a traditional mechanism

[116] I consider that this right can be established, prima facie.

Conclusion

[117] I have considered the rights claimed in the application against existing law in relation to whether or not they are capable of being recognised and whether the application provides sufficient

information to establish, prima facie, their existence. I am satisfied, having considered the information before me, that all of the rights claimed in this application can be established, prima facie. Therefore the rights to be registered on the Register of Native Title Claims are as follows:

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 recognised, the nature and extent of the native title rights and interests claimed in relation to the application area are the non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs being:

(a) the right to access and move about the 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 resources or other traditional resources obtained from the application area;

(i) the right to engage and participate in cultural activities and conduct traditional pursuits on the application area;

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

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

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

(m) 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;

(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, or communal needs.

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

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

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.

[118] 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.

[119] Under s 190B(7), I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application. In *Doepel*, Mansfield J considered the nature of the Registrar's task at s 190B(7) which was approved by the Full Court in *Gudjala FC*:

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

[120] Jody Miller was born and brought up in Port Lincoln, which he states is part of his country as taught to him by his father and grandfather. Although he has spent time away from their traditional country, he has maintained a continuous connection with it, which includes 'a strong spiritual connection to the country of [his] ancestors who still occupy the land'—at [7]-[10]. He states that his father taught him about Nauo country showing him the places and stories, information which he continues under Nauo traditional law and custom, to pass on to his own children and grandchildren—at [16]. Jody Miller has detailed knowledge and understanding of the geographical features of the claim area and adjacent Nauo country and speaks of his abiding connection to his ancestors. He knows many of the traditional mythological stories of his country and he regularly accesses the claim area to hunt and protect sites such as fish traps and rockholes—at [12]-[18].

[121] I am satisfied that at least one member of that group currently has a traditional physical connection with parts of the application area.

[122] 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 s61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Section 61A provides:

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

[123] 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)

[124] Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. The geospatial report dated 18 April 2017 and a search that I have made of the Tribunal's geospatial databases on the day of my decision confirms that there are no approved determinations of native title over the area covered by the application.

Section 61A(2)

[125] 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. As I have found in relation to s 190B(2), the amended application can be read to include the original application. Schedule B of the original application makes the requisite statements at paragraphs 1 and 2.

Section 61A(3)

[126] 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. The applicant only claims exclusive possession over areas where it can be recognized (areas where there is no prior extinguishment or where it can be validly disregarded)—at Schedule E, paragraph 1.

Conclusion

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

Subsection 190B(9)

No extinguishment etc. of claimed native title

The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:

- (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
- (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
- (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss 47, 47A or 47B.

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

Section 190B(9)(a)

[129] Schedule Q contains the requisite statement that no claim is made to ownership of minerals, petroleum or gas that are wholly owned by the Crown.

Section 190B(9)(b)

[130] Schedule P provides the requisite statement that exclusive possession is not claimed over any offshore place.

Section 190B(9)(c)

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

Conclusion

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

Procedural and other conditions: s 190C

Subsection 190C(2)

Information etc. required by ss 61 and 62

The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

[133] The application satisfies the condition of s 190C(2), because it contains all of the details and other information and documents required by ss 61 and 62, as set out in the reasons below.

[134] Section 190C(2) 'directs attention to the contents of the application and supporting affidavits' and 'seeks to ensure that the application contains 'all details' required by s 61'. This condition is procedural only and simply requires the Registrar to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss 61 and 62. I am not required to undertake any merit or qualitative assessment of the material for the purposes of my consideration—*Doepel* at [16] and also at [35] to [39].

[135] 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)

[136] This section provides that a native title determination application may be made by 'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group'. The Registrar must consider 'whether the application sets out the native title claim group in the terms required by s 61'—*Doepel* at [36]. Specifically:

If the description of the native title claim group were to indicate that not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and the Registrar should not accept the claim for registration—*Doepel* at [36].

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

Name and address for service: s 61(3)

[138] Part B of the application states on page 19 the name and address for service of the persons who are the applicant.

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

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

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

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

Details required by s 62(1)(b)

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

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

[142] Schedule B of the amended application provides a metes and bounds description of the geographical external boundaries of the area covered by the application, referencing geographic coordinate points – information required by s 62(2)(a)(i).

[143] As I have found in relation to s 190B(2), the amended application can be read to include the original application. Schedule B of the original application identifies the areas not covered by the application by way of general exclusion statements – information required by s 62(2)(a)(ii).

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

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

Searches: s 62(2)(c)

[145] Schedule D provides the statement that no such searches have been undertaken in relation to the area covered by the application.

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

[146] Schedule E provides a description of the native title rights and interests claimed in relation to the area covered by the application.

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

[147] Schedule F refers to Attachment F which provides a description of the factual basis for the claim made in the application.

Activities: s 62(2)(f)

[148] Schedule G lists the activities the claim group currently carries out in relation to the area covered by the application. Other applications: s 62(2)(g)

[149] Schedule H states that the applicant is aware of the Barngarla Native Title Claim that covers part of the area covered by the Nauo No. 2 application and refers to the Court's determination of that matter in *Croft*.

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

[150] Schedule HA provides the statement that no such notices have been given in relation to the area covered by the application.

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

[151] Schedule I provides the statement that the details of any such notices are not known at this time.

Conclusion

[152] The application contains the details specified in ss 62(2)(a) to (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.

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

[154] The Tribunal's geospatial report confirms that the Nauo No. 2 application overlaps the Barngarla Native Title Claim application. As referred to earlier in these reasons, the Barngarla Native Title Claim was determined by the Court on 23 June 2016, conditional on the registration of the Barngarla Settlement Indigenous Land Use Agreement. Until such time as the determination is placed on the National Native Title Register (NNTR) the Barngarla Native Title Claim remains on foot.

[155] My search against the Tribunal's Register of Native Title Claims (the Register) confirms that the Barngarla Native Title Claim application has had an entry on the Register since 4 April 1996. It has remained on the Register since that time as a result of its consideration by the Registrar under s 190A on 15 February 2000. It is a previous application that overlaps the area covered by the current application in the sense discussed in s 190C(3)(a) to (c). I must therefore consider whether or not there are common claim group members between the current application and the 'previous' Barngarla Native Title Claim application.

[156] I have compared the descriptions of the native title claim group in each application and I am satisfied there are no claimants common to both groups.

[157] 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.

[158] For the condition of s 190C(4) to be met, I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met. Schedule R refers to Attachment R which comprises a certification made by South Australian Native Title Services (SANTS). As the application purports to be certified by the representative body for the area, the relevant consideration for me is at s 190C(4)(a). This imposes upon the Registrar conditions which, according to Mansfield J, are straightforward—*Doepel* at [72]. All that the task requires is that I be ‘satisfied about the fact of certification by an appropriate representative body’ which necessarily entails:

- identifying the relevant native title representative body (or bodies) and being satisfied of its power under Part 11 to issue the certification; and
- being satisfied that the certification meets the requirements of s 203BE—*Doepel* at [80]-[81].

Identification of the representative body

[159] The Tribunal’s geospatial report confirms that SANTS is the only representative body for the whole of the area covered by the application. The certificate states that SANTS is funded under s 203FE to perform the functions of a representative body. It is therefore the only body that could certify the application under s 203BE.

[160] The certificate states that SANTS has performed its certification function under s 203BE(a) in relation to the Nauo No. 2 native title determination application. The certificate is dated 21 June 2016 and is signed by the Chief Executive Officer of SANTS.

Does the certificate meet the requirements of 203BE

[161] For the purposes of s 203BE(4)(a), the certificate contains statements in relation to the requirements of paragraphs 203BE(2)(a) and (b). That is, SANTS certifies that it is of the opinion:

- that all the persons in the native title claim group have authorised the applicant to make the application and to deal with all matters arising in relation to it ; and
- that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the other persons in the native title claim group—at [5].

[162] For the purposes of s 203BE(4)(b), the certificate briefly sets out the reasons for SANTS being of that opinion, namely:

- its office has worked extensively with the native title claim group for many years in relation to the area covered by the application as well as in relation to the adjacent Nauo application;
- it notified the community of and facilitated a meeting on 22 September 2015 in Port Lincoln of the native title claim group to authorise the applicant to make and deal with the proposed Nauo No. 2 application;
- at the meeting the native title claim group unanimously resolved -
 - there is no traditional decision-making processes that must be complied with, and therefore agreed to an adopted a process of voting by a show of hands,
 - those present at the meeting were representative of apical ancestors set out in the notice,
 - to make a native title determination application over the area shown on the map in the notice for the meeting, and
 - authorised the persons identified at Part A of the application to be the applicant to make the application.

[163] In my view, the statements made in the certificate, as summarised above, are sufficient for it to be said that the certificate briefly sets out the reasons for SANTS being of the opinion that the requirements of s 203BE(2)(a) and (b) have been met.

[164] For the purposes of s 203BE(4)(c), the representative body must also briefly set out how it has met the requirements of s 203BE(3). That subsection provides for a representative body's obligations to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications. Whilst it is clear that the application overlaps the current extent of the Barngarla Native Title Claim, the certificate does not address this issue. I understand, and the geospatial report confirms this, that the determination in *Croft*, once finalized by the registration of a settlement ILUA, will result in the removal of the current overlap with the Nauo No. 2 application. I am of the view that the certificate's omission to address the overlap issue and its eventual resolution is not fatal to the compliance of the certificate.

[165] I am satisfied that the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, thereby complying with s 190C(4)(a).

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Nauo No. 2
NNTT file no.	SC2016/003
Federal Court of Australia file no.	SAD188/2016

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:

21 June 2016

Date application entered on Register:

3 July 2017

Applicant:

Brenton Weetra, Pauline Branson, Cynthia Weetra-Buzza, Jody Miller

Applicant's address for service:

South Australian Native Title Services Ltd
Level 4, 345 King William Street
Adelaide SA 5000
Phone: 08 8110 2800
Fax: 08 8110 2811

Area covered by application:

(a) the area covered by the application

A copy of Schedule B of the application sets out a metes and bounds description of the area covered by the application and is attached to this extract.

(b) any areas within those boundaries that are not covered by the application

1 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
2. 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.
 3. 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.
 4. 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
 - 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.
 5. 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.
 6. The area covered by the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.
 7. All the words and expressions used have the same meaning as they are given in the Native Title Act 1993 (Cth). unless otherwise specified

Persons claiming to hold native title:

Under the traditional laws and customs of the Central Lakes cultural region the Nauo People comprise a group of those Aboriginal people, who hold in common the traditional laws and customs that are associated with Nauo Country because of:

- (a) descent from a Nauo apical ancestor; or
 - (b) an affiliation with Nauo Country through a parent or grandparent; or
 - (c) birth on or near Nauo Country;
- AND
- (d) a long-term association with the Nauo Country; and
 - (e) traditional geographic and spiritual knowledge of the Country; and
 - (f) identifies as a Nauo person; and
 - (g) is identified as a Nauo person by other members of the claim group; or

A person is considered to be descended from a Nauo apical ancestor where that person is 'raised up' by a biologically descended Nauo Person. 'Raising up' includes assuming the responsibilities of a parent and guardian, and raising the person in the traditions of Nauo law and culture.

Under Nauo traditional laws and customs, Nauo People are related by means of a traditional principle of descent to the following apical ancestors:

Mary, a Nauo woman born c. 1840s, and who was the mother of Henry Weetra is acknowledged as an apical ancestor for the Nauo #2 Native Title claim.

Henry Weetra, born c.1869, and his known wife Eliza Goldsmith. He is acknowledged as an apical ancestor for the Nauo #2 Native Title claim. Henry and his partner Eliza had 13 children.

Essie Weetra, born 16 March 1891 is acknowledged as an apical ancestor of the Nauo #2 Native Title claim

Registered native title rights and interests:

1) Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where 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 recognised, the nature and extent of the native title rights and interests claimed in relation to the application area are the non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs being:

- (a) the right to access and move about the 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 resources or other traditional resources obtained from the application area;
- (i) the right to engage and participate in cultural activities and conduct traditional pursuits on the application area;
- (j) the right to teach on the application area the physical and spiritual attributes of locations and sites within the application area;
- (k) the right to maintain and protect sites and places of significance under traditional laws and customs on the application area;
- (l) the right to maintain, conserve and/or protect significant artworks, song cycles, narratives, beliefs or practices by preventing (by all lawful means) any activity occurring on the application area which may desecrate, damage, disturb or interfere with any such artwork, song cycle, narrative, belief or practice;
- (m) 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;
 - (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, or communal needs.

- 4) The native title rights and interests are subject to:
- a) the valid laws of the State of South Australia and the Commonwealth of Australia;
 - 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.

Attachments

1. Description of the external boundaries of the claim area, Schedule B of the application, 3 pages – A4, 03/07/2017.
2. Map of claim area, Attachment C of the application, 1 page - A4, 06/04/2017.

Lisa Jowett