

Registration Decision

Application name	First Nations of the South East #1
Name of applicant	Andrew Birtwistle-Smith, Mark Lovett, Kinglsey A'Hang, Jean Pinkie, Darren Perry, Michelle Jacquelin-Furr, Gwenda Owen, Christopher Hartman, Myrtle Bonney, Bruce Hammond, Robyn Campbell and Cheryle Saunders
Federal Court of Australia No.	SAD211/2017
NNTT No.	SC2017/002
Date of Decision	10 November 2017

Claim accepted for registration

I have decided that the claim in the First Nations of the South East #1 application satisfies all of the conditions in ss 190B and 190C of the *Native Title Act 1993 (Cth)*.¹ Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.

Heidi Evans

*Delegate of the Native Title Registrar*²

¹ All legislative sections are from the *Native Title Act 1993 (Cth)* (the Act), unless stated otherwise.

² 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 23 August 2017 and made pursuant to s 99 of the Act

Reasons for Decision

CASES CITED

Corunna v Native Title Registrar [2013] FCA 372 (*Corunna*)

Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia [1999] FCA 686 (*Ngarluma People v Monadee*)

Griffiths v Northern Territory of Australia [2007] FCAFC 178 (*Griffiths*)

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (*Gudjala 2007*)

Gudjala People # 2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (*Gudjala 2008*)

Martin v Native Title Registrar [2001] FCA 16 (*Martin*)

Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*)

Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*)

Sampi v State of Western Australia [2005] FCA 777 (*Sampi*)

State of Western Australia v Strickland [2000] FCA 652 (*Strickland FC*)

Stock v Native Title Registrar [2013] FCA 1290 (*Stock*)

Strickland v Native Title Registrar [1999] FCA 1530 (*Strickland*)

Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*)

Western Australia v Ward [2002] HCA 28 (*Ward HC*)

BACKGROUND

- [1] The application was filed on 4 August 2017 on behalf of the First Nations of the South East #1 native title claim group.
- [2] The Registrar of the Federal Court (the Court) gave a copy of the application and accompanying affidavits to the Native Title Registrar (Registrar) on 7 August 2017 pursuant to s 63 of the Act.
- [3] If the claim in the application satisfies all the registration test conditions in ss 190B and 190C, then the Registrar must accept the claim for registration.³ If it does not satisfy all the conditions, the Registrar must not accept the claim for registration.⁴
- [4] I have decided that the claim satisfies all of the registration test conditions and my reasons on each condition follow below.

Similarities with the First Nations of the South East #2 application

- [5] The First Nations of the South East #2 (FNSE #2) application was filed prior to the current application, on 7 July 2017. The persons comprising the applicant and the description of the native title claim group for the FNSE #2 application are identical to the current application.

³ See 190A(6).

⁴ See 190A(6B).

Both applications were filed by South Australian Native Title Services Ltd (SANTS) as the legal representative for the applicant.

- [6] The areas covered by the two applications are adjacent. The FNSE #2 application covered an area along the south east coast of South Australia, roughly between Salt Creek in the north, and Kingston in the south. The current application covers a much larger area to the south and east of the FNSE #2 application area. The current application area abuts the border between South Australia and Victoria, and encompasses the regional centres of Keith, Bordertown, Naracoote, Millicent and Mount Gambier.
- [7] In addition to the description of the native title claim group in Schedule A and the applicant persons, the description of the native title rights and interests claimed in relation to each application, set out in Schedule E, is also identical.
- [8] Due to these similarities between the applications, I have considered it appropriate that I rely on my reasons in the decision to accept the FNSE #2 application (decision of 6 October 2017) at those conditions where the information before me for my consideration is identical to the information contained in that application. Specifically, I refer to ss 190B(3) and 190B(4).
- [9] For the reader's convenience, I have repeated those reasons below at the conditions referred to, but noted that they are an exact copy of what appears at that condition in the FNSE #2 application decision.

Merits of the claim (s 190B) – Conditions met

Identification of area subject to native title – s 190B(2) condition met

[10] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.

What is required to meet this condition?

[11] For the application to meet the requirements of s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the ‘particular land and waters’ where native title rights and interests are claimed. The two questions for this condition are whether the information and map provides certainty about:

- (a) the external boundary of the area where native title rights and interests are claimed; and
- (b) any areas within the external boundary over which no claim is made.⁵

Does the information about the external boundary meet this condition?

[12] Attachment B is entitled ‘First Nations of the South East No. 1: External boundary description’. It describes the external boundary of the application area by metes and bounds, referencing native title determination applications, the South Australian/Victorian border, Ngarkat Conservation Park, roads, land parcels, geographic coordinates and the mean low water mark of the coastline.

[13] The map at Attachment C is a colour map, titled ‘First Nations of the South East No. 1’ with the application area depicted by a dark blue outline. The map contains a topographic image background, scale bar, legend, coordinate grid and locality diagram, and notes relating to the source, currency and datum of data used to prepare the map.

[14] Both the written description and map were prepared by the National Native Title Tribunal’s (Tribunal) Geospatial Services who confirmed they are consistent and identify the application area with reasonable certainty.⁶ Having considered the information before me about the area covered by the application, I agree with the assessment, and consider that the information allows for the boundaries of the area to be identified on the earth’s surface.

Does the information about excluded areas meet this condition?

[15] Schedule B of the application contains a written description of areas within the external boundary that are not covered by the application. Any areas within the external boundary where native title has been extinguished by ‘previous exclusive possession acts’ are excluded from the application area,⁷ except where provisions of the Act require that extinguishment to

⁵ *Doepel* at [122]

⁶ Geospatial assessment dated 8 August 2017.

⁷ See Schedule B at [1i]

be disregarded (ss 47, 47A or 47B).⁸ Schedule B also excludes areas where native title rights and interests have otherwise been extinguished.⁹

[16] I am satisfied that the written description of the internally excluded areas provides reasonable certainty for the purposes of this condition. It will be possible to work out any internally excluded areas affected by a previous exclusive possession act or other extinguishment once historical and current tenure searches are completed.¹⁰

Identification of the native title claim group – s 190B(3) condition met

[17] The application satisfies the condition at s 190B(3).

What is required to meet this condition?

[18] The focus of my consideration at this condition is whether the application ‘enables the reliable identification of the persons in the native title claim group.’¹¹ The correctness of that information or whether the persons described do in fact qualify as members of the native title claim group is not a matter I am permitted to consider.¹²

Does the description of the persons in the native title claim group meet this condition?

[19] The description of the native title claim group in Schedule A appears as follows:

The Native Title Claimants are those Aboriginal people who:

(a) Are the biological descendants of the following ancestors:

- Kitty Russell of Kingston (aka Queen Kitty)
- Ellen (#1) aka Elsie of Mount Gambier
- Ellen (#2) Baker of Mount Gambier
- Pinkie (male), of Bordertown
- Annie Brice of Mount Gambier
- Whympie (male) of Kingston
- Emily of Penola and her husband John Dunn
- Queen Catharine Gibson of Kingston.
- Frank Owen of Kingston
- Harry Hewitt of Millicent
- Mount Gambier Tom of Mount Gambier; and

(b) Are identified and accepted as First Nations of the South East people under traditional law and custom on the basis of descent from a First Nations of the South East person; or

(c) Are accepted by those listed at (a) as being adopted into the First Nations of the South East community under traditional law and custom

[20] From this, it is my understanding that there are two rules governing the persons comprising the native title claim group. The first rule provides that an individual must be a biological descendant of one of the named apical ancestors, *and* be identified and accepted as being a

⁸ See Schedule B at [5].

⁹ See Schedule B at [6].

¹⁰ This approach is supported by the decisions in *Ngarluma People v Monadee* and *Strickland* at [51] to [52].

¹¹ *Doepel* at [51].

¹² *Doepel* at [37].

biological descendant. The second rule, namely where the first rule doesn't apply, is that an individual must be accepted by the biological descendants meeting the criteria in (a), as being adopted into the First Nations of the South East community under traditional law and custom. I take it to mean that this 'community' is the same persons otherwise known as the native title claim group.

[21] I accept that identifying at any one point in time those persons comprising the group would require some factual inquiry. However, by starting with one individual and applying the two rules, I am satisfied that the members of the group could be identified with sufficient clarity. The requirement for a factual inquiry in determining these persons is not, in my view, fatal to the description satisfying s 190B(3).¹³ I note that in *WA v NTR*, Carr J found a description using almost identical criteria sufficient for the purposes of s 190B(3).

[22] It follows that I am satisfied that the persons in the group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Identification of claimed native title – s 190B(4) condition met

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

What is required to meet this condition?

[24] The test of identifiability at s 190B(4) is whether the claimed native title rights and interests are 'understandable and have meaning'.¹⁴ In applying this test, I have had regard to the definition of 'native title rights and interests' in section 223(1) of the Act. I have not, however, undertaken an individual assessment of whether each right or interest claimed satisfies that definition, as I consider this a more appropriate task for the condition at s 190B(6) regarding whether the rights and interests can be prima facie established. This is addressed in my reasons below at that condition.

Does the description of the native title rights and interests meet this condition?

[25] The description of the rights and interests claimed appears at Schedule E. Paragraph one includes a claim to a right of exclusive possession where it can be claimed (i.e. where there has been no prior extinguishment of native title or where s 238 and/or ss 47, 47A and 47B apply). Paragraph two lists 12 non-exclusive rights. Paragraphs three and four set out qualifications on the rights claimed, including that certain rights described are traditional rights exercised to satisfy personal, domestic or communal needs, and that all the rights and interests claimed are subject to the valid laws of the State and the Commonwealth.

[26] It is my view that the description of the rights and interests claimed is clear and easily understood, and that the rights and interests set out in Schedule E have meaning as native title rights and interests. I have read the contents of the description together, including the stated qualifications, and it is my view that there is nothing ambiguous or contradictory within the description.

[27] I am satisfied the description contained in the application is sufficient to allow the native title rights and interests claimed to be readily identified.

¹³ *WA v NTR* at [67].

¹⁴ *Doepel* at [99].

Factual basis for claimed native title – s 190B(5) condition met

[28] I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion. In particular, there is a sufficient factual basis for the three assertions of subsections 190B(5)(a), (b) and (c).

What is needed to meet this condition?

[29] For the application to meet the requirements of s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. 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;
- (b) that there exist traditional law acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and
- (c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[30] The question for this condition is whether the factual basis is sufficient to support these assertions. To answer that question, I must assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.¹⁵

[31] Section 62(2)(e) requires only a 'general description' of the factual basis. However, where the facts provided are not at a sufficient level of detail to enable a genuine assessment of the application by the Registrar, the application may not be able to satisfy the condition. The material must comprise 'more than assertions at a high level of generality'.¹⁶

[32] To satisfy the condition, the material must contain sufficient details addressing the particular native title, claimed by the particular native title claim group, over the particular land and waters of the application area.¹⁷

[33] Through reliance on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a) that accompany the application, that each deponent believes the statements contained in the application to be true, I have accepted the asserted facts as true.¹⁸

[34] The factual basis material appears in Attachments F and M.

What is needed to provide a sufficient factual basis for s 190B(5)(a)?

[35] To meet s 190B(5)(a), the factual basis must support the assertion that 'the native title claim group have, and the predecessors of those persons had, an association with the area.' Generally, to satisfy this requirement:

¹⁵ *Doepel* at [16]-[17]; *Gudjala 2008* at [83] and [92].

¹⁶ *Gudjala 2008* at [92].

¹⁷ *Gudjala 2007* at [39].

¹⁸ *Gudjala 2008* at [91] to [92].

- it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times;¹⁹
- it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;²⁰ and
- the materials must support that the association both presently and by the group's predecessors relates to the area as a whole.²¹

Is there a sufficient factual basis for the requirement at s 190B(5)(a)?

[36] I am satisfied the factual basis is sufficient to support the association assertion. The material addresses an association of the claim group's predecessors with the application area at settlement, and over the period since settlement. It also addresses an association of the group presently with the area. The information about this association is geographically specific to the application area, and relates to the whole of the area.

[37] Attachment F states that the first exploration of the region including the application area was between 1800 and 1802, at which point Mount Gambier and Mount Schank (both within the application area) were named. It explains that settlement of the region took place around the 1830s to the 1850s, with the establishment of pastoral runs and a number of settlements in the area. In particular, Attachment F provides that Mount Gambier was settled in the 1840s, Bordertown in 1852, and Millicent in 1870.²² As explained in the background to the application above, these are all regional centres within the application area.

[38] It follows that I must consider whether the factual basis material is sufficient to support an association of the predecessors of the group with the area around the 1830s to the 1850s, being the date of European settlement. I am also required to consider whether the factual basis is sufficient to support an association of the predecessors with the area over the period since settlement.

[39] Attachment F refers to historical and ethnographic sources indicating the relatively high-density Aboriginal population of the area prior to settlement, and from the information in these sources, suggests that this was a result of the abundance of natural resources in the application area.²³ Attachment F explains that the persons comprising the pre-contact predecessors of the native title claim group members of three tribes: the Bunganditj, the Potaruwutj and the Meintangk.²⁴ It's further explained that these labels are taken from Tindale's 1974 map of the region, a copy of which is included in Attachment F.²⁵ From my consideration of this map, I understand that the areas which those three tribes were recognised as being associated with roughly align with the combined areas of the FNSE #2 application and the current application.

¹⁹ *Gudjala 2007* at [52].

²⁰ *Gudjala 2007* at [51] and [52].

²¹ See *Martin* at [23]–[26], affirmed in *Corunna* at [35]–[39] and [42]–[44].

²² Attachment F, p. 1.

²³ Attachment F, pp. 1-2.

²⁴ Attachment F, p. 2.

²⁵ See diagram at p. 5.

- [40] Regarding the apical ancestors named in Schedule A from whom the claim group are descended, Attachment F states that these persons ‘have been shown by preliminary genealogical and documentary research, (including genealogies prepared in the late 1930s and early 1940s by Tindale and the Berndts²⁶) to be either recorded as persons from these language groups, or to have been from and living in the South East’.²⁷
- [41] Specific information relating to each apical ancestor is provided in the material. For example, Attachment F states that Kitty Russell is recorded in Tindale’s genealogies compiled at Point McLeay (north of the application area) in 1939. She is identified as ‘Queen of the Kingston Tribe’, and a Meintank woman.²⁸ Apical ancestor Pinkie is said to appear in historical sources, which provide that he married [name removed] in 1875 in the traditional way, and he moved about the application area with his wife, living at Padthaway, Mount Monster, Pinaroo and Nalang. Pinkie is recorded in a piece in the *Border Chronicle* as having died at his camp close to Cannawigra Road around 1888 after falling from a tree at a nearby property.²⁹ From my own research of the Tribunal’s mapping database, I understand all of these locations to be within the application area, as is Kingston, with which Kitty Russell was associated.
- [42] Included in the information about each of the apical ancestors are dates of birth, marriage, death, birth dates of their children, and dates of specific events documented in various historical records. For example, it’s explained that the daughter of apical ancestor Whympie, [name removed], was recorded as being a young child when the ship ‘Maria’ was wrecked on the coast near Kingston in 1840.³⁰ From this, I understand that Whympie would have been living in the application area at the time of settlement, his daughter being born prior to 1840. Elsewhere, Attachment F provides that apical ancestor Emily (married to John Dunn) appears in one of Tindale’s 1939 genealogies, as does her son, [name removed], who is noted as 58 years of age.³¹ I understand, therefore, that Emily’s son was born around 1881. From this, I consider it reasonable that I can infer Emily was born around 1860.
- [43] In Tindale’s records, Emily is recorded as of the Paintjung Tribe of Penola, about Naracoorte. Her son [name removed] is recorded as ‘of Kingston’.³² Again, through my own research of the Tribunal’s mapping database, I have identified all of these places as being within the boundary of the application area.
- [44] Another apical ancestor, Tom, of Mount Gambier, is said to appear in historical sources as a Bungadidj or Boandik man, who died near Tantanoola in 1883.³³ Both Mount Gambier and Tantanoola are within the application area. According to the records, he was believed to be around 90 years old when he passed away, which places his date of birth sometime in the late 1700s or early 1800s.³⁴

²⁶ Footnote 24 of Attachment F, p. 9, provides that ‘[t]he Berndts were a husband and wife anthropology team with an international reputation who began their research careers with South Australian fieldwork in the late 1930s – early 1940s’.

²⁷ Attachment F, p. 3.

²⁸ Attachment F, p. 8.

²⁹ Attachment F, p. 8.

³⁰ Attachment F, p. 9.

³¹ Attachment F, p. 9.

³² Attachment F, p. 9.

³³ Attachment F, p. 10.

³⁴ Attachment F, p. 10.

- [45] In my view, this information is sufficient in supporting an assertion that the predecessors of the native title claim group were associated with the application area around the time of settlement. The information speaks to the presence of the apical ancestors at various locations across the application area. According to the dates set out in Attachment F, I accept that some of these persons were present in the area at the time of settlement, namely during the period 1830 to 1850, while the remaining apical ancestors were born in the decades that followed.
- [46] In my view, the material also addresses an association of the predecessors of the group with the area since that time. In addition to information about the apical ancestors, Attachment F includes information about the immediate descendants of those persons. For example, it states that apical ancestor Whympie's daughter, [name removed] ([name removed] or [name removed]) appears in various newspaper items and documents. In particular, these sources provide that she married [name removed] and lived most of her life with him at Blackford before moving to Kingston. She is also recorded as an accomplished basket weaver, who died in 1954.³⁵
- [47] Further information addressing an association of the predecessors of the group with the area over the period since settlement is in Attachment M, in statements provided by claim group members about their childhood, and the elders they spent time with on the application area. For example, one claimant explains that as a boy, he would go to Cape Jaffa and Wrights Bay with his family, to camp and to fish.³⁶ These locations are both within the application area.
- [48] Another claimant states that 'in the Old Days', his predecessors lived around Poochera Swamp (also within the application area) 'in their kangaroo skins', hunting ducks and gathering eggs for food. He describes how he lived there with his family, carrying water and hunting food as 'there was no such thing as welfare payments'. He explains they lived like this up until the 1960s.³⁷ And further, another claimant recalls [name removed] ([name removed]) living with her family at Blackford and teaching her about bush tucker.³⁸
- [49] In my view, this information clearly speaks to an association of the predecessors of the group with the area over the period since settlement.
- [50] Regarding an association of the claimants today with the application area, it is clear from the material in Attachment M that many of the claim group members have lived most of their lives within the application area, and many continue to live within the area presently. For example, Attachment M includes the following statement from a claimant:

I was born in Kingston. I grew up there. Went to school, worked and lived there after school. Left Kingston when I was sixteen and went to live in Mount Gambier with my sister. We used to do all sorts of things and get around the region. I lived there in Mount Gambier for a few years and got married there. Left there and went up to Port Augusta for a while. Then I moved to Adelaide and Murray Bridge a while, and then I came back to the South East, to Kingston first, then to Wolseley

³⁵ Attachment F, p. 9.

³⁶ Attachment M, p. 2.

³⁷ Attachment M, p. 2.

³⁸ Attachment M at p. 1.

where I bought a house and I live there. Have been there ever since. It's in my country and I feel at home there. So do my kids, grand kids and great grand kids. All of them live in this area.³⁹

- [51] There are numerous other statements from claimants in Attachment M where those persons talk about time they have spent at various locations across the application area. This includes time spent on the area teaching younger generations about significant places within the area.⁴⁰
- [52] This information is specific and detailed, and goes directly to the presence of the members of the claim group in the application area today. I have considered the places referred to, including those mentioned in the statement excerpted above, and am satisfied that they fall within the application area. It follows that I am satisfied the factual basis is sufficient in supporting an association of the claim group with the area presently.
- [53] At s 190B(5)(a), the factual basis must speak to an association of the group and its predecessors with the whole of the application area. I have set out above from the information before me, the places named in the material about the group and predecessors' association. Also above, I have explained that as a result of my own research of the Tribunal's mapping databases, I have identified almost all of these places to be within the application area. Having considered the location of these places with reference to the boundary of the application area, it is further my view that they are geographically spread across the entirety of the area, such that the association asserted in the material can be said to be with the whole of the area.

What is required to provide a sufficient factual basis for s 190B(5)(b)?

- [54] To meet s 190B(5)(b), the factual basis must support the assertion 'that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests'. The wording of s 190B(5)(b) is almost identical to paragraph (a) of the definition of 'native title rights and interests' within s 223(1) of the Act. Dowsett J approached this in *Gudjala 2007*⁴¹ by considering s 190B(5)(b) in light of the case law regarding s 223(1)(a), particularly the leading decision of the High Court in *Yorta Yorta*.⁴²
- [55] According to the High Court's decision in *Yorta Yorta*, a law or custom is 'traditional' where:
- (a) it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice';⁴³
 - (b) the origins of the content of the law or custom concerned can be found in the normative rules of a society⁴⁴ which existed before the assertion of sovereignty by the Crown;⁴⁵

³⁹ At p. 1.

⁴⁰ See Attachment M at p. 1.

⁴¹ *Gudjala 2007* at [26] and [62] to [66].

⁴² *Yorta Yorta*.

⁴³ *Yorta Yorta* at [46].

⁴⁴ The term 'society' in this context is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs'—*Yorta Yorta* at [49].

⁴⁵ *Yorta Yorta* at [46].

- (c) the normative system has had a ‘continuous existence and vitality since sovereignty’;⁴⁶ and
- (d) the relevant society’s descendants have acknowledged the laws and observed the customs since sovereignty and without substantial interruption.⁴⁷

[56] Dowsett J found that a sufficient factual basis must therefore demonstrate that the laws and customs relied on by the claim group ‘have their source in a pre-sovereignty society and have been observed since that time by a continuing society.’ His Honour held that a ‘starting point must be identification of an indigenous society at the time of sovereignty’, and concluded that a sufficient factual basis must also establish a link between the native title claim group described in the application and the area covered by the application, which involves ‘identifying some link between the apical ancestors and any society identified at sovereignty.’⁴⁸

[57] I understand that it is not appropriate that I impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the factual basis condition of s 190B(5).⁴⁹

Is there a sufficient factual basis for the requirement at s 190B(5)(b)?

[58] The factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the claim group giving rise to the claim to native title. The material addresses the presence in the area at settlement of a society of people living according to identifiable laws and customs, and explains the link between the apical ancestors named in the description of the claim group in Schedule A and that society. There is also information before me that speaks of laws and customs acknowledged and observed by the claim group that are rooted in the laws and customs of the society at settlement.

[59] The starting point at s 190B(5)(b) must be the identification of a society of people, at European settlement in the area, living according to identifiable laws and customs. As above, the material asserts settlement to have taken place in the period from 1830 to the 1850s.

[60] Attachment F provides that the ‘pre-contact’ society inhabiting the south east of South Australia, namely the area covered by the application, comprised members of three tribes.⁵⁰ Attachment F adopts the names Tindale gave to these tribes in his 1974 map of the region: Bunganditj, Potaruwutj and Meintangk, however it’s explained that there are various alternative spellings given to the three tribes throughout historical and anthropological works

⁴⁶ *Yorta Yorta* at [47].

⁴⁷ *Yorta Yorta* at [87].

⁴⁸ See *Gudjala 2007* at [63] and [66] respectively. Although the Full Court found error in Dowsett J’s evaluation of the factual basis materials, the Full Court did not disagree with his Honour’s assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether ‘there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs’—*Gudjala 2008* at [96]. (1850–1860 is the time of European settlement of the Gudjala application area.)

⁴⁹ See also *Stock* at [64] where His Honour held that ‘it must be borne in mind that the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists’.

⁵⁰ At p. 2.

about the area. These include Boandik, Buwandik, Moandik, Mootatunga, Paintjung and Pinejunga.⁵¹

- [61] Regarding the persons comprising those three tribes, prior to or at settlement, Attachment F provides they were ‘a broadly defined cultural confederation of people, having discernable similarities of language and social organisation’.⁵² Further to this, Attachment F refers to a recent linguistic study of these groups within the area, which concludes they spoke ‘mutually intelligible dialects of a single language’.⁵³
- [62] Information about the laws and customs acknowledged and observed by this society at settlement is set out in Attachment F. Part 2 of Attachment F includes excerpts from various historical and anthropological sources, which record ways in which the members of the society at settlement acknowledged and observed laws and customs in the application area.
- [63] For example, an excerpt from a source from 1880 titled ‘The Boandik Tribe’ by early settler in the area, Christina Smith, provides a description of a burial ceremony performed by the local Aboriginal people.⁵⁴ In other excerpts in Attachment F, she explains the way in which these people used plants for medicinal uses, and how they accessed numerous resources from the area for sustenance.⁵⁵ In these excerpts, Smith describes the particular methods by which those natural resources are obtained, or particular methods for their use.⁵⁶ Again, in further excerpts, she tells of mythologies and creation stories known and shared with her by the Boandik people, and the way in which the Boandik teach their children to ‘love their country’.⁵⁷
- [64] From this information, I understand the material to assert that there were particular behaviours and practices upheld by the persons comprising the society in the area at settlement, or at least in the years following settlement. In my view, this material is sufficient in supporting an assertion of a society at settlement in the area acknowledging and observing normative laws and customs.
- [65] Elsewhere, Attachment F states that the apical ancestors named in the description of the claim group in Schedule A, from whom the claim group are descended, are persons who were living in the area subject of the application during the ‘colonial era’.⁵⁸ I understand this to mean that these persons were present in the area during the period when settlement was taking place. Further, Attachment F explains that the apical ancestors have been shown through preliminary genealogical and documentary research to be recorded as persons from the three named groups, or recorded as living in, or being from, places within the application area.⁵⁹ This is supported by the information included in Attachment F about each apical

⁵¹ At pp. 2-3.

⁵² At p. 2.

⁵³ At p. 3.

⁵⁴ Attachment F, p. 19.

⁵⁵ At p. 13.

⁵⁶ See for example, p. 14.

⁵⁷ See at pp. 10, 21.

⁵⁸ At p. 7.

⁵⁹ At p. 3.

ancestor. For example, Attachment F provides that one of Tindale's 1939 genealogies recorded apical ancestor Kitty Russell as 'Queen of Kingston', and of the 'Meintank Tribe'.⁶⁰

- [66] In my view, this information is sufficient in establishing a link between the apical ancestors and the society at settlement. That is, I understand the material to assert that the apical ancestors were members of that society.
- [67] At s 190B(5)(b), the factual basis material must speak to 'traditional laws and customs'. Traditional laws and customs are those that have been passed down through the generations to the members of the claim group today, by word of mouth and common practice. In my view, there is information that addresses this intergenerational pattern of teaching. For example, as above, Attachment F contains an excerpt from Smith, where she explains that the Booandik spoke 'very proudly of their land, and of their forefathers.. and they taught their children to love their country'.⁶¹ Elsewhere Attachment F contains a statement from a claim group member about how laws and customs and knowledge about country are handed down to younger generations today. The claimant states: ... 'My grandson is only twelve but I have already shown him quite a few places and taught him to respect them. He gets bush tucker, I tell him what he can eat and what you can't'.⁶²
- [68] Traditional laws and customs are also those that are rooted in the laws and customs of the society at settlement in the area. In my view, there are specific examples in the material before me, of laws and customs acknowledged and observed by the group today, that are rooted in the laws and customs of the society at settlement.
- [69] The information above from Attachment F about the way in which members of the claim group teach younger generations to respect places within the application area, and the fact that this same practice was observed and recorded by Smith regarding the Booandik people in the area shortly after settlement, is one example.
- [70] Another example is in an excerpt from Smith where she observes the local Indigenous people using plants from the area for medicinal purposes.⁶³ A claim group member describes how this practice continues today in the following way: 'And there are grasses collected for medical things. My aunties would brew the stuff up'.⁶⁴
- [71] A further example is in the information about the mythological stories and creation stories known by the group and their predecessors. In Attachment F, it's explained that Smith recorded a number of mythologies which the Booandik shared with her.⁶⁵ One such mythology is that of Kroitbul, 'the creation myth for three of the region's volcanic cones, Mounts Muirhead, Schank and Gambier'.⁶⁶ Elsewhere in Attachment F, a member of the claim group recounts her version of this story, explaining that 'Kroitbul was the giant Bowandik ancestor who created all the craters..'⁶⁷ From this, I understand that this story of Kroitbul, and how he created the landscape of the application area, is part of the mythology that exists pursuant to

⁶⁰ At p. 8.

⁶¹ At p. 21.

⁶² At p. 21.

⁶³ At p. 13.

⁶⁴ Attachment M, p. 3.

⁶⁵ At p. 10.

⁶⁶ At p. 10.

⁶⁷ At p. 11.

the group's laws and customs, and that has been passed down through the generations to the members of the claim group today.

[72] One other example of laws and customs rooted in those of the society at settlement is in the material that speaks to particular practices for using natural resources taken from the application area. For example, Attachment F refers to an anthropological source that describes the way in which the group's predecessors shared resources taken from the application area, such as water from natural springs.⁶⁸ Other sources which speak about traditional routes of trade, including one running along the Coorong and down to the Bungandidj in the south east, where the group's predecessors traded various natural resources taken from the application area, in my view, indicate the sharing of resources as an aspect of the laws and customs of the society at settlement.⁶⁹ I consider statements from claimants in the material to suggest that today, laws and customs around the sharing of resources continue to be acknowledged and observed, and that the practice has been handed down through the generations to the claim group. One claimant states: 'Among ourselves, we give things all the time. If you have a lot of fish or yabbies, even firewood, other people get some as well. We pass it around. That's the way we do things.'⁷⁰

[73] In summary, from the information before me, I consider that there are a number of aspects of the laws and customs of the society at settlement that are reflected in the laws and customs acknowledged and observed by the claim group today. It follows that I consider the factual basis material sufficient to support an assertion of traditional laws and customs.

What is required to provide a sufficient factual basis for s 190B(5)(c)?

[74] To meet s 190B(5)(c), the factual basis must support the assertion 'that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.' In order for a delegate to be satisfied that there is a factual basis for s 190B(5)(c) there must be some material which addresses the following matters outlined by Dowsett J in *Gudjala 2007*:

- that there was a society at settlement that observed traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed to the claim group;
- that there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least European settlement.⁷¹

Is there a sufficient factual basis for the requirement at s 190B(5)(c)?

[75] I am satisfied the factual basis is sufficient to support an assertion that the claim group have continued to hold their native title in accordance with traditional laws and customs.

[76] I have already set out above at s 190B(5)(b), the reasons for which I am satisfied the factual basis addresses a society in the application area at settlement, acknowledging and observing normative laws and customs. I have also explained above at s 190B(5)(b), the reasons for

⁶⁸ At p. 13.

⁶⁹ At p. 17.

⁷⁰ Attachment F, p. 17.

⁷¹ *Gudjala 2007* at [82].

which I am satisfied the factual basis speaks to traditional laws and customs, that is, laws and customs acknowledged and observed by the claim group today that are rooted in those of the society at settlement.

- [77] In my view, the factual basis also addresses the way in which those traditional laws and customs have continued to be acknowledged and observed by the predecessors of the claim group, over the period since settlement, without substantial interruption.
- [78] In particular, I rely on the factual basis material that explains the knowledge certain members of the claim group, and certain predecessors of the claim group, have and have had, about the way in which their ancestors before them acknowledged and observed laws and customs in relation to the application area. In my view, this information supports an assertion of continuity in the observance of the traditional laws and customs.
- [79] For example, in Attachment M, a claimant shares her memory of Queen [name removed] (the daughter of apical ancestor, Whympie), explaining that [name removed] lived with her and her family at Blackford, and taught her about bush tucker.⁷² In Attachment F, it's explained that [name removed] described the coronation of her aunt, Queen Catharine Gibson (an apical ancestor for the claim group), to a journalist for a local paper. The article, in 1927, includes a statement from [name removed], in which she describes the coronation as involving 'days of dancing, hunting and making feast', and where Catharine wore 'native beads' and 'there was much corroboree'.⁷³
- [80] Elsewhere in the material, one claimant explains how in the 'Old Days' his predecessors lived around Poochera Swamp, 'in their kangaroo skins', gathering eggs and hunting ducks. This claimant goes on to state that Bordertown (the town closest to Poochera Swamp) is still his 'special place'. He says: 'My family lived there. My ancestors are there. Still is a very spiritual place. I can feel it when I am there.'⁷⁴
- [81] Having considered this information, it is my understanding that claimants possess knowledge of the way their predecessors before them, including at and prior to settlement, and across the generations, have acknowledged and observed traditional laws and customs. This includes laws and customs around access to and use of natural resources, ceremonies, and respect for places where ancestor spirits dwell. In my reasons above at s 190B(5)(b), I note that I accept some of these matters to be aspects of the system of traditional laws and customs asserted in the material.
- [82] It is further my understanding that this knowledge about the claimants' predecessors carrying out activities pursuant to their traditional laws and customs, has been passed down to the claimants through the generations in a continual pattern, and that it forms the basis of the way they uphold those laws and customs today.

Prima facie case – s 190B(6): condition met

- [83] I consider that some of the claimed rights and interests have been established on a prima facie basis. Therefore, the claim satisfies the condition of s 190B(6).

⁷² At p. 1.

⁷³ At p. 20.

⁷⁴ Attachment M at pp. 2-3.

What is required to meet this condition?

[84] For the application to meet the requirements of s 190B(6), the Registrar ‘must consider that, prima facie, at least some of the native title rights and interests claimed can be established.’ I note the following comments by Mansfield J in relation to this condition:

1. it requires some measure of the material available in support of the claim;⁷⁵
2. although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);⁷⁶
3. s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.⁷⁷

[85] Mansfield J found that the use of the words ‘prima facie’ in s 190B(6) means that ‘if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.’⁷⁸

Which of the claimed native title rights and interests can be established on a prima facie basis?

Non-exclusive right to access and move about the area

[86] This right appears in Schedule E as the right to ‘access and move the Application Area’. I understand this to be a typographical error, and that the right claimed is in fact the right to access and move *about* the application area. I have approached my consideration with this in mind.

[87] From the information discussed in my reasons above at s 190B(5), it is clear that many of the claim group and their predecessors were born within, and lived the most part of their lives on, the application area. These persons have also worked in the area, and travelled to particular places in holiday times, to camp and spend time with other families.⁷⁹

[88] From this information before me, I consider the right to access and move about the application area, prima facie, established.

Non-exclusive right to live, camp and erect shelters and other structures in the area

[89] As above, the information in the factual basis material makes it clear that many members of the claim group and their predecessors, including the apical ancestors around the time of settlement, lived in places within the application area. Attachment F also contains excerpts from sources regarding the remnants of old campsites in the application area, which in my view, support a right to camp in the area. Regarding a right to erect structures on the area, in Attachment M, one claimant describes the ‘tin and kerosene huts’, with ‘dirt floors’ that he lived in as a child in Bordertown.⁸⁰

[90] In my view, this information is sufficient to allow me to consider this right, prima facie, established.

⁷⁵ Doepel at [126].

⁷⁶ Doepel at [127].

⁷⁷ Doepel at [132].

⁷⁸ Doepel at [135].

⁷⁹ See Attachment M.

⁸⁰ Attachment M, p. 2.

Non-exclusive right to hunt and fish on the area without limitation

[91] There is a considerable amount of information in Attachments F and M about the way in which the claimants' predecessors at settlement, and the claimants today, fish and hunt within the application area.⁸¹ This material I have discussed to some extent in my reasons above at s 190B(5).

[92] In my view, this information is sufficient to allow me to consider the right, prima facie, established.

Non-exclusive right to gather and use the natural resources of the area

[93] Again, there is considerable information before me regarding this right, and the way the predecessors of the claim group around the time of settlement exercised it, and the way the claim group today exercise it. Again, some of this material I have discussed above in my reasons at s 190B(5), for example, the way in which the predecessors of the group used plants from the area for medicinal purposes, and how this practice continues today.⁸²

[94] In my view, this material is sufficient to allow me to consider the right, prima facie, established.

Non-exclusive right to share and exchange the resources of the area

[95] Attachment F speaks to this right when it refers to anthropological sources that describe traditional trade routes that existed through the application area, including one running down along the Coorong to the Bunganditj⁸³. Following this, a claimant explains that members of the group continue to share resources among themselves when there is an abundance.⁸⁴

[96] In my view, this information is sufficient in allowing me to consider the right, prima facie, established.

Non-exclusive right to use and take natural water resources of the area

[97] Again, Attachment F speaks to this right, including an excerpt from Smith (1880) of her observing the local Boandik people taking water from a nearby spring.⁸⁵ There are also statements from claimants about camping in the area, and I consider I can infer that water was taken during these periods of camping, for cooking, cleaning, and/or washing.⁸⁶

[98] In my view, therefore, the material is sufficient to allow me to consider the right, prima facie, established.

Non-exclusive right to cook and light fires for domestic purposes on the area

[99] An excerpt from Smith is provided in Attachment F where she explains the way the Boandik people made a fire to boil a billy when she was camping with them.⁸⁷ Elsewhere, claimants talk about gathering firewood, for campfires, and for cooking purposes.⁸⁸

⁸¹ See for example, Attachment F at p. 13; Attachment M at p. 2.

⁸² Attachment F at p. 13; Attachment M at p. 3.

⁸³ At p. 17.

⁸⁴ At p. 17.

⁸⁵ At p. 18.

⁸⁶ See for example, Attachment M at p. 2.

⁸⁷ At p. 19.

⁸⁸ See for example, Attachment M at p. 2.

[100] In my view, this is sufficient to allow me to consider the right, prima facie, established.

Non-exclusive right to engage and participate in cultural activities on the area

[101] Schedule E specifies that these cultural activities include those relating to birth and death. Attachment F addresses this right, where it includes an excerpt from Smith regarding her observations of a Booandik burial.⁸⁹

[102] In my view, this is sufficient to allow me to consider the right, prima facie, established.

Non-exclusive right to conduct ceremonies and hold meetings on the area

[103] Attachment F also contains information addressing other types of ceremony carried out by the claim group and its predecessors. For example, it includes excerpts from historical sources that explain how groups of the application area would gather with neighbouring groups for corroborees, and gives some detail regarding what was involved in these celebrations.⁹⁰

[104] In my view, this information is sufficient to allow me to consider the right, prima facie, established.

Non-exclusive right to teach on the area

[105] As explained in my reasons at s 190B(5)(b), there is information before me that describes how the predecessors of the claim group taught their children to 'love their country'.⁹¹ I also explain above the information before me about how members of the claim group continue to engage in this teaching on country of younger generations today.⁹²

[106] In my view, this information is sufficient to allow me to consider the right, prima facie, established.

Non-exclusive right to visit, maintain and protect sites on the area

[107] Attachment M contains a statement from a claimant who explains how she visits certain places within the application area, including places where sand drifts uncover bones, which she describes as 'very special' and 'very important'.⁹³ Attachment F describes how this claimants' parents taught her about these places, and took her along when they visited them.⁹⁴

[108] In my view, this information is sufficient to allow me to consider the right, prima facie, established.

Non-exclusive right to be accompanied by non-native title holders on the area

[109] Attachment F addresses this right when it refers to an excerpt from Smith, where she describes the way in which a Booandik couple travelled with her through the application area as her guides.⁹⁵ From this, I understand that the predecessors of the group considered themselves to possess a right to take non-Booandik people into and through the application area.

⁸⁹ At p. 19.

⁹⁰ Attachment F at p. 20.

⁹¹ At p. 21.

⁹² For example at Attachment M, p. 1.

⁹³ At p. 1.

⁹⁴ At p. 21.

⁹⁵ At p. 22.

[110] In my view, this information is sufficient to allow me to consider the right, prima facie, established.

Which of the claimed native title rights and interests cannot be established on a prima facie basis?

Right of exclusive possession

[111] The nature of a native title right to exclusive possession was discussed in *Ward HC*, where the High Court held that:

A core concept of traditional law and custom [is] the right to be asked permission and to ‘speak for country’. It is the rights under traditional law and custom to be asked permission and to ‘speak for country’ that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others.⁹⁶

[112] Since *Ward HC*, the following principles have emerged from the case law, indicating what the material may need to address in providing prima facie support for a right of exclusive possession:

- a native title right to exclusive possession includes the right to make decisions about access to and use of the land by others;⁹⁷
- the right cannot be formally classified as proprietary - its existence depends on what the evidence discloses about its content under traditional law and custom;⁹⁸
- the material must speak to how, pursuant to their laws and customs, the group is able to ‘exclude from their country people not of their community’, acting as ‘gatekeepers for the purpose of preventing harm and avoiding injury to country’.⁹⁹

[113] There is scarce material before me that I consider speaks to a right of exclusive possession. Part 2 of Attachment F is entitled ‘The First Nations of the South-East Native Title Rights and Interests’. It provides an excerpt from a historical source of 1903, where a colonist describing the ‘peoples of the South East’ states: ‘The blacks had many curious laws of their own. They believed the country was theirs, and that they had a right to all game and eatables on it.’¹⁰⁰

[114] Elsewhere, Attachment F quotes an anthropological source which explains that during ‘hard seasons’, resources such as water springs were shared and ‘transgressions permitted’. Regarding this excerpt, Attachment F suggests ‘we can also see a right to give or withhold permission’.¹⁰¹ In my view, the meaning of the source is too ambiguous and uncertain to support any implied right of the claim group possessing a right of exclusive possession. Further, there is nothing provided with the excerpt to confirm that it speaks about the predecessors of the claim group in the claim area.

[115] These statements are not sufficient to allow me to consider a right to exclusive possession, prima facie, established. While Attachment F appears to assert that in colonial times, the Indigenous occupants of the area ‘believed the country was theirs’, there is no information before me addressing the matters the case law has indicated are relevant to an assessment of whether the right exists. That is, there is no information before me about the members of the

⁹⁶ *Ward HC* at [88].

⁹⁷ *Sampi* at [1072].

⁹⁸ *Griffiths* at [71].

⁹⁹ *Griffiths* at [127].

¹⁰⁰ At p. 13.

¹⁰¹ At p. 13.

claim group speaking for country, or information about how other non-claimants must seek permission to enter the application area. In my view, the excerpt provided in the material about resources being shared in ‘hard seasons’ is not sufficient.

[116] I also note there is no information before me about the way in which the group seek to exclude persons for the purposes of preventing harm or avoiding injury to their country.

[117] It follows that I do not consider the right, prima facie, established.

Physical connection – s 190B(7): condition met

[118] I am satisfied at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the claim area.

What is required to meet this condition?

[119] For the application to meet the requirements of s 190B(7), the Registrar ‘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’.¹⁰²

[120] The following principles have emerged from the case law about what is required at s 190B(7):

- the material must satisfy the delegate of particular facts;
- evidentiary material is, therefore, required; and
- the focus is confined to the relationship of at least one member of the native title claim group with some part of the claim area;¹⁰³
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group;¹⁰⁴
- the material may need to address an actual presence on the area.¹⁰⁵

Is there evidence that a member of the claim group has a traditional physical connection?

[121] There is information before me that allows me to be satisfied that Gwen Owen has or has had, a traditional physical connection with some part of the application area.

[122] The factual basis material provides the following information about Gwen Owen:

- she was born in Kingston and grew up there;¹⁰⁶
- she lived in Mount Gambier with her sister as a young adult, and got married there;¹⁰⁷
- she now lives in Wolseley;¹⁰⁸

¹⁰² See subsection (a).

¹⁰³ *Doepel* at [17].

¹⁰⁴ *Gudjala 2007* at [89].

¹⁰⁵ *Yorta Yorta* at [184].

¹⁰⁶ Attachment M, p. 1.

¹⁰⁷ Attachment M, p. 1.

¹⁰⁸ Attachment M, p. 1.

- as a child, she observed her elders gathering plants and seeds from the natural surroundings, for example wattle seeds which were ground up to make a damper-like bread;¹⁰⁹
- she has taught young kids how to take gum from the trees and chew on it like a lolly, in the same way she did as a child;¹¹⁰
- as a child at Christmas, her family would feast on wild duck and swan hunted by her father and others;¹¹¹
- she was taught about significant sites within the application area including women’s sites and men’s sites (one at Jip Jip Rocks where she was not allowed to go);¹¹²
- she teaches her grandchildren and other young people about these sites, to respect them, and takes them to places within the application area.¹¹³

[123] It is clear from the information before me that Gwen Owen has been physically present within the application area. She has lived within the area for almost her entire life. Kingston, Mount Gambier and Wolseley are all places within the external boundary of the application area. Consequently, I am satisfied she has a physical connection with the area.

[124] The question is whether this physical connection is in accordance with the traditional laws and customs of the First Nations of the South East People. I note that the information explains the way in which Ms Owen observed her elders using natural resources from the application area, and the way in which, as a child, she used particular resources herself. The information also provides that she has passed on these methods of using natural resources to younger generations. Particular practices around the use of resources from the application area, I note I identified in my reasons above at s 190B(5)(b), as being an aspect of the traditional laws and customs of the claim group.

[125] Another aspect of the system of traditional laws and customs asserted by the material that I discuss in my reasons above, is the way in which these laws and customs, and knowledge about the activities associated with acknowledging and observing those laws and customs, have been passed down through the generations to the claimants. In my view, it is clear from the information before me that Ms Owen continues to undertake this practice of teaching younger generations, including on the application area. In this way, I consider the material sufficient to allow me to be satisfied that she has a traditional physical connection with the application area.

No failure to comply with s 61A – s 190B(8): condition met

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

Requirement	Information addressing requirement	Result
s 61A(1) no native title determination	Geospatial assessment (8 August 2017)	Met

¹⁰⁹ Attachment M, p. 1.

¹¹⁰ Attachment M, p. 1.

¹¹¹ Attachment M, p. 1.

¹¹² Attachment F, p. 21.

¹¹³ Attachment F, p. 21.

application if approved determination of native title	confirms no determinations overlapping any part of the application area	
s 61A(2) claimant application not to be made covering previous exclusive possession over areas	Schedule B, paragraph 1	Met
s 61A(3) claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas	Schedule B, paragraph 3	Met

No extinguishment etc. of claimed native title – s 190B(9): condition met

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

Requirement	Information addressing requirement	Result
(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	Met
(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	Met
(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, paragraph 6	Met

Procedural and other matters (s 190C)—Conditions met

Information etc. required by sections 61 and 62 – s 190C(2): condition met

[128] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

What is required to meet this condition?

[129] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62. This condition does not require any merit or qualitative assessment of the material to be undertaken.¹¹⁴

Subsection 61

[130] The application contains the details specified in s 61.

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Schedule A	Met

¹¹⁴ *Doepel* at [16] and also at [35] to [39].

Section	Details	Form 1	Result
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

Subsection 62

[131] The application contains the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Accompanying	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B and Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Attachments F and M	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

No previous overlapping claim group – s 190C(3): condition met

[132] I am satisfied that no person included in the native title claim group for this application was a member of the native title claim group for any previous overlapping application.

What is required to meet this condition?

[133] To meet s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the **current application**¹¹⁵) was a member of a native title claim group for any previous application.’ To be a ‘previous application’:

1. the application must overlap the current application in whole or part;
2. there must be an entry for the claim in the previous application on the Register of Native Title Claims when the current application was made; and
3. the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[134] It is only where there is an application meeting all three criteria at s 190C(3), that is, a ‘previous application’, that the requirement for me to consider the possibility of common claimants is triggered.¹¹⁶

[135] The geospatial assessment of 8 August 2017 shows that there are no applications overlapping any part of the current application area. As the first criterion is not satisfied, there is no need for me to consider the remaining criteria. The requirement is met.

¹¹⁵ *Emphasis in original.*

¹¹⁶ See *Strickland FC* at [9].

Identity of claimed native title holders – s 190C(4): condition met

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

What is required to meet this condition?

[137] For the application to meet the requirements of s 190C(4), the Registrar must be satisfied that the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions.¹¹⁷ If the application has not been certified, the Registrar must be satisfied that 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.¹¹⁸

[138] If the application is certified, the certification must contain the information required by ss 203BE(4)(a) to (c). Schedule R refers to Attachment R which is a certificate from SANTS. As the application purports to be certified by the representative body for the area, the relevant requirement for me to consider is at s 190C(4)(a).

What is required at s 190C(4)(a)?

[139] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward.¹¹⁹ 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.¹²⁰

[140] Pursuant to s 203BE(4), a written certification by a representative body must:

- include a statement to the effect that the representative body is of the opinion that the requirements of paragraphs of s 203BE(2)(a) and (b) have been met;¹²¹
- briefly set out the body’s reasons for being of that opinion;¹²² and
- where applicable, briefly set out what the body has done to meet the requirements of s 203BE(3) in relation to any overlapping applications.¹²³

[141] Pursuant to s 203BE(2), a ‘representative body must not certify ... an application for a determination of native title unless 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 matters arising in relation to it; and
- all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.’

¹¹⁷ See subsection 190C(4)(a).

¹¹⁸ See subsection 190C(4)(b).

¹¹⁹ *Doepel* at [72].

¹²⁰ *Doepel* at [80] and [81].

¹²¹ Section 203BE(4)(a).

¹²² Section 203BE(4)(b).

¹²³ Section 203BE(4)(c).

Is SANTS an appropriate representative body that can certify?

[142] Attachment R is entitled 'Certification of First Nations of the South East #1 Claim'. It is dated 4 August 2017 and has been signed by the Acting Chief Executive Officer of SANTS on behalf of the body. The geospatial assessment confirms that SANTS is the only representative body for the whole of the area covered by the application.¹²⁴

[143] Paragraph [1] of the certificate states that SANTS is a company funded by the Australian Government 'to perform all the functions of a representative body in South Australia pursuant to section 203FE' of the Act. From my consideration of the NNTT's national 'Representative Aboriginal/Torres Strait Islander Body Areas' map, on the NNTT's website, I have confirmed that SANTS is a body funded pursuant to s 203FE to perform the functions of a representative body for Greater South Australia. It is my understanding, from the certificate, that SANTS is funded to perform all of the functions of a representative body, and on that basis, it has the requisite authority to certify native title determination applications.

[144] I am satisfied, therefore, that SANTS is an appropriate body who can certify the application.

Does the certificate meet the requirements of s 203BE(4)?

[145] The certificate contains the statement required by s 203BE(4)(a) at paragraph [5].

[146] For the purposes of s 203BE(4)(b), it is my view that the certificate contains very limited information addressing the matter at s 203BE(2)(b), that is, that 'all reasonable efforts have been made to ensure the application describes or otherwise identifies all other persons in the native title claim group'. While the certificate refers to SANTS working with the 'native title claim group members', there is no information explaining what efforts were undertaken to identify those persons. The certificate does, however, state that the SANTS office 'has worked extensively with' the claim group, 'over many years'. From this, I consider it reasonable to infer that during that time, research was undertaken, or at least relied upon, to support the current composition of the claim group. The certificate does state that upon the native title claim group expressing an intention to make a native title determination application in the area, SANTS undertook research in relation to the proposed claim. While further detail of the process of identifying the persons who comprise the claim group would be ideal, in the circumstances, I have considered the information contained in the certificate to be sufficient for the purposes of s 203BE(4)(b).

[147] For the purposes of s 203BE(4)(c), where applicable, the representative body must briefly set out how it has met the requirements of s 203BE(3). That subsection requires a representative body to make all reasonable efforts to reach agreements between any overlapping claimant groups and to minimise the number of overlapping applications over the area subject of the certification. In my view, as there are no other applications that cover the area of the First Nations of the South East #1 application (confirmed by the geospatial assessment), there is no requirement for the certificate to address this provision. I note that the certificate is silent regarding the requirement at s 203BE(4)(c).

[148] Therefore, I consider the certification satisfies the requirement at s 203BE(4).

¹²⁴ Geospatial assessment dated 8 August 2017.

[149] It follows that I am satisfied 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	First Nations of the South East #1
NNTT No.	SC2017/001
Federal Court of Australia No.	SAD211/2017

Section 186(1): Mandatory information

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.

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

4 August 2017

Date application entered on Register:

10 November 2017

Applicant:

[As per the extract from Schedule of Native Title Applications]

Applicant's address for service:

[As per the extract from Schedule of Native Title Applications]

Area covered by application:

[As per the extract from Schedule of Native Title Applications]

Persons claiming to hold native title:

[As per the extract from Schedule of Native Title Applications]

Registered native title rights and interests:

[As per the extract from Schedule of Native Title Applications – EXCEPT that the right to exclusive possession at paragraph 1) is NOT to be entered onto the Register. This right is NOT being registered]

Heidi Evans

10 November 2017

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 23 August 2017 and made pursuant to s 99 of the Act.