National Native Title Tribunal

Registration test decision

Application name	First Nations of the South East #2
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
NNTT file no.	SC2017/001
Federal Court of Australia file no.	SAD180/2017
Date of decision	6 October 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 do not accept this claim for registration pursuant to s 190A of the *Native Title Act 1993* (Cth).

For the purposes of s 190D(3), my opinion is that it is not possible to determine whether the claim satisfies all of the conditions in s 190B because of a failure to satisfy s 190C.

Date of reasons: 12 October 2017

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Heidi Evans

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 23 August 2017 and made pursuant to s 99 of the Act.

Reasons for decision

Introduction

[1] This document sets out my reasons, as the delegate of the Native Title Registrar (Registrar), for the decision to not accept the claim for registration pursuant to s 190A of the Act.

[2] The Registrar of the Federal Court of Australia (the Federal Court) gave a copy of the First Nations of the South East #2 claimant application to the Registrar on 7 July 2017 pursuant to s 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s 190A of the Act.

[3] Given that the application was made on 7 July 2017 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

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

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.

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

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

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

Native title claim group: s 61(1)

[8] A description of the native title claim group appears in Schedule A. It is only where, on the face of the application, it appears that not all of the persons comprising the native title claim group are included in that description, or where the description is of a sub-group or part only of the actual native title claim group, that the application will fail to meet this condition – *Doepel* at [36].

[9] Having considered the description before me, there is nothing to indicate that it seeks to exclude certain persons, or that it describes only part of the actual native title claim group.

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

Name and address for service: s 61(3)

[11] The name and address for service of the applicant's representative is detailed at Part B of the application.

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

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

[13] My concern at this condition is only that information identifying the native title claim group, in the terms prescribed by s 61(4), is contained in the application – *Wakaman People 2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 (*Wakaman*) at [34]. I am not to consider the correctness of that information or whether the description provided is 'sufficiently clear' – see *Wakaman* at [34] and *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [31] and [32].

[14] As above, a description of the persons comprising the native title claim group appears at Schedule A.

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

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

[16] The application is accompanied by twelve affidavits, one sworn by each of the applicant persons. The affidavits contain identical statements, and having considered those statements, it is my view that they address the matters prescribed by ss 62(1)(a)(i) to (v).

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

Details required by s 62(1)(b)

[18] 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)*

[19] This information appears in Schedule B, and Attachment B to Schedule B.

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

[20] A map showing the external boundary of the application area is contained in Attachment C to Schedule C.

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

[21] Schedule D provides that the applicant has not undertaken any searches to determine the existence of any non-native title rights and interests in relation to the land or waters covered by the application.

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

[22] Schedule E contains a description of the native title rights and interests claimed by the native title claim group in relation to the land and waters of the application area.

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

[23] The factual basis material is contained in Attachment F to Schedule F and Attachment M.

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

[24] The activities currently undertaken by members of the claim group on the land and waters of the application area are set out in Schedule G.

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

[25] Schedule H refers to the Ngarrindjeri and Others Native Title Claim (SAD6027/1998) that overlaps the whole of the area covered by the application.

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

[26] Schedule HA states that the applicant is not aware of any such notifications.

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

[27] Schedule I contains the details of three notices issued under s 29 that relate to the whole or part of the application area.

Conclusion

[28] 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.

[29] The application does not satisfy the condition at s 190C(3).

[30] It is only where there is a previous application that meets all three criteria set out at ss 190C(3)(a), (b) and (c) that the requirement for me to consider the possibility of common claimants between the claim group for the previous application and the claim group for the current application is triggered – *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[31] The criterion at s 190C(3)(a) is satisfied. Schedule H states that the applicant is aware of one overlapping application: Ngarrindjeri and Others Native Title Claim (SAD6027/1998). The geospatial assessment and overlap analysis (geospatial assessment) of the application area prepared by the National Native Title Tribunal (Tribunal)'s Geospatial Services (dated 25 July 2017) confirms that this application overlaps the current application.

[32] The criterion at s 190C(3)(b) is satisfied. The geospatial assessment provides that the previous application was on the Register at the time the current application was made. From my own research of the Tribunal's databases, I am aware that the Ngarrindjeri and Others Native Title Claim has appeared in an entry on the Register since January 2000 and has not been removed since that time.

[33] The criterion at s 190C(3)(c) is satisfied. From my research of the Tribunal's databases, I am aware that the previous application was entered onto the Register following it being considered by a delegate of the Registrar pursuant to s 190A.

[34] It follows that I must consider whether any of the persons comprising the native title claim group for the current application, are also members of the native title claim group for the previous application. My view is that there are common members between the claim groups. Schedule O states:

> The applicant and members of the native title claim group are aware that some of their members are members of the Ngarrindjeri and Others Native Title Claim (SAD6027 /1998) which covers the whole application area.
>
> At least two of the apical ancestors listed in the Ngarrindjeri and Others claim Form 1 are listed as apical ancestors for the First Nations of the South East #2 claim group: Kitty Russell and Queen Catharine Gibson.

[35] I have considered the list of apical ancestors set out in the description of the native title claim group in Schedule A of the current application and confirmed that both Kitty Russell and Queen Catharine Gibson appear in that description. I have also accessed the extract from the Register of Native Title Claims for the Ngarrindjeri and Others Native Title Claim and verified that Kitty Russell is included in the claim group description for that overlapping application. The

description also includes a '[name removed] and his wife Katherine', who I have inferred is the Queen Catharine Gibson named in the description for the current application. I have also identified 'Whympie' as a common apical ancestor between the two applications.

[36] On this basis, I cannot be satisfied that no person included in the native title claim group for the current application was a member of the native title claim group for any previous application.

[37] The application does not satisfy the condition of s 190C(3).

Subsection 190C(4)
Authorisation/certification

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

[38] I must be satisfied that the requirements set out in either ss 190C(4)(a) or (b) are met, in order for the condition of s 190C(4) to be satisfied. Schedule R refers to Attachment R which is a certificate from South Australian Native Title Services Ltd (SANTS). The requirement at s 190C(4)(a) applies in these circumstances.

[39] The application satisfies the requirement at s 190C(4)(a) as it has been certified by each representative body that can certify the application under Part 11 of the Act.

[40] The requirement is that I am satisfied of the fact of certification by an appropriate representative body – *Doepel* at [78]. This is a two-pronged test. Firstly, does the representative body who certified the application have the appropriate authority to certify? And secondly, does the certification comply with s 203BE(4)?

[41] Attachment R is entitled 'Certification of First Nations of the South East #2 Claim'. It is dated 6 July 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 in relation to the application area.

[42] Paragraph one of the certificate states that SANTS is a company funded 'to perform all the functions of a representative body in South Australia pursuant to section 203FE' of the Act. From my consideration of the Tribunal's national 'Representative Aboriginal and Torres Strait Islander Body Areas' map, on the Tribunal's website, I have confirmed that SANTS is a body funded pursuant to s 203FE to perform the functions of a representative body. 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.

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

[44] Section 203BE(4) sets out the requirements of a valid certification. Having considered the information within the certificate, I am satisfied that it contains the statement required by s 203BE(4)(a).

[45] Regarding the brief information supporting that statement pursuant to 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' in relation to a claim in the south east of the State of South Australia. 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. While further detail of this process would be ideal, in the circumstances, I have considered this to be sufficient for the purposes of s 203BE(4)(b).

[46] Section s 203BE(4)(c) requires information about action the representative body has taken to address overlapping claims, pursuant to s 203BE(3). The geospatial assessment confirms that there is one claim that entirely overlaps the current application, being Ngarrindjeri and Others Native Title Claim (SAD6027/1998). The certificate does not address the overlapping claim, that is, it does not contain any information that goes to the requirement at s 203BE(4)(c).

[47] Section 203BE(3) makes clear that a failure by the representative body to take the actions prescribed by that provision to reduce overlapping claims 'does not invalidate any certification of the application by the representative body'. It follows that it is open to the representative body to do nothing, that is not to take any action, to address overlapping claims. From the silence in the certificate regarding the requirement at s 203BE(4)(c), I take it to mean that SANTS has not taken any action to address the overlapping Ngarrindjeri and Others Native Title Claim. In my view, this is sufficient for the purposes of s 203BE(4)(c).

[48] It follows that I consider the certificate complies with s 203BE(4).

[49] I am satisfied of the fact of certification of the application by the only representative body for the area.

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.

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

[51] As above, a map of the application area is contained in Attachment C to Schedule C, and a description of the boundaries of the area is contained in Attachment B to Schedule B. Information identifying areas within the external boundary that are excluded from the application is contained in Schedule B. It is my view that this approach to describing excluded areas is sufficient at this condition – *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) at [50] to [55].

[52] Attachment B is entitled 'First Nations of the South East No. 2 - External boundary description'. It has been prepared by the Tribunal's Geospatial Services and is dated 5 July 2017. It describes the external boundary of the application area by metes and bounds, referring to road reserve, cadastral parcels, geographic coordinates, existing native title determination and application boundaries, and the mean low water mark.

[53] The map at Attachment C is a colour map, titled 'First Nations of the South East No. 2', which has also been prepared by the Tribunal's Geospatial Services. It is dated 5 July 2017 and includes:

- the application area depicted by a dark blue outline;
- colour topographic image background;
- scale bar, coordinate grid and inset map; and
- notes relating to the source, currency and datum of data used to prepare the map.

[54] The geospatial assessment provides that the map and description are consistent and identify the application area with reasonable certainty. 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.

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.

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

[56] 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' – *Doepel* at [51]. 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 – at [37].

[57] 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

[58] 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 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.

[59] 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) – *Western Australia v Native Title Registrar* [1999] FCA 1591 at [67].

I note that in *WA v NTR*, Carr J found a description using almost identical criteria sufficient for the purposes of s 190B(3).

[60] 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.

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.

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

[62] The test of identifiability at s 190B(4) is whether the claimed native title rights and interests are 'understandable and have meaning' – *Doepel* at [99]. 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.

[63] 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 (ie, 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.

[64] 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.

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

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

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[66] 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).

[67] At this condition, I am to 'address the quality of the asserted factual basis for [the] 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' – *Doepel* at [17]. I am not to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence', as this is the role of the Federal Court – *Doepel* at [17].

[68] 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' – *Gudjala People 2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala 2008*) at [92].

[69] To satisfy the condition, therefore, 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 – see *Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*) at [39].

[70] Through reliance on the statements contained in the affidavits sworn by the applicant persons pursuant to s 62(1)(a) and accompanying the original application that they believe the statements contained in the application to be true, I have accepted the asserted facts as true – *Gudjala 2008* at [91] to [92].

[71] The applicant's factual basis material is contained in Schedule G, Attachment F and Attachment M.

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

Reasons for s 190B(5)(a)

[73] The application satisfies the condition at s 190B(5)(a), as the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the application area.

[74] The case law indicates that the following is required at this condition:

- material supporting an association of the group as a whole presently with the area – *Gudjala 2007* at [51] and [52];
- material supporting an association of the predecessors of the whole claim group with the area over the period since sovereignty, or at least European settlement – *Gudjala 2007* at [51] and [52];
- it is not necessary for the factual basis to support an association of all members of the group with the area at all times – *Gudjala 2007* at [52];
- material supporting the association of the group presently, and of the group's predecessors, as being with the whole of the area – *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [23] to [26].

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

[75] The requirement at s 190B(5)(a) is met. I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the land and waters of the application area.

[76] The material before me explains that the application is the first of two applications filed by the native title claim group – at Schedule G. It is my understanding that the second application, named the First Nations of the South East #1 (FNSE #1 application), was filed on 4 August 2017, shortly after the current application. Schedule G explains that the area covered by the FNSE #1 application is adjacent to, and south and east of, the current application area. From this, I accept that the area in relation to which the First Nations of the South East claim native title rights and interests is a much larger area than the area subject of the current application.

[77] At this condition, the material must address an association of the predecessors of the group with the area at sovereignty, or at least European settlement. The material doesn't assert a particular date at which settlement in the region took place, however from certain information before me, I have inferred that it took place in the 1860s. In particular, Attachment F provides that John Gall was an early settler in the region, who established two properties, one at Tilleys Swamp and the other at Cantara (both within the application area), in the 1860s – at p. 3.

[78] Regarding an association of the predecessors of the group with the area at this time of settlement, I note that the material does not provide the dates of birth or any other dates at which the apical ancestors named in Schedule A were associated with the area. Attachment F confirms, however, that the apical ancestors have been 'shown by genealogical and documentary research',

including 'genealogies prepared in the late 1930s and early 1940s', to be persons of the social/tribal groups identified as inhabiting the area, or to have been from and living in the area – at p. 2. From this information, I consider it reasonable to infer the apical ancestors were adult persons in the 1930s and 1940s, present in the application area.

[79] Schedule A provides further information about the association of the apical ancestors with the area, describing each apical ancestor as 'of' a certain place. These places include Kingston, Mount Gambier, Bordertown and Millicent. From my own research of the Tribunal's Native Title Vision Plus mapping database, I am aware that none of these places fall directly within the application area, however Kingston is located adjacent to the boundary of the application area. Mount Gambier, Bordertown and Millicent are all located within the broader area encompassed by the FNSE #1 application. In my view, this is sufficient. As above, Attachment F states historical research demonstrates these apical ancestors as being from, or having lived in the area. Elsewhere it explains that one of these persons is buried within the application area – at p. 8. In addition, the material refers to mythologies of the groups identified as inhabiting the area that refer to sites within the application area, and that were recorded around the time of the apical ancestors – Attachment F at pp. 6-7. In this way, I consider the material supports both a physical and spiritual association of the apical ancestors of the group with the area.

[80] Noting my inference above that the apical ancestors were adult persons in the 1930s and 1940s, I have further inferred that the birth dates of these persons is likely to have been in the 1890s and 1900s, some 30 years after the date of settlement asserted within the material.

[81] In my view, the material speaks to an association of the predecessors of the group with the area prior to the apical ancestors, including at settlement. Attachment F states that members of the native title claim group 'recognise that they are from several precontact social groups that inhabited the South East' – at p. 1. Regarding those groups and the areas with which they were associated, Attachment F includes an excerpt from an anthropological source identifying the Bunganditj, Potaruwutj and Meintangk as the tribes that comprised the South East People. Booandik and Buwandik are explained as alternate names for Bunganditj, while Moandik is suggested as being an alternative name for Meintangk – at pp. 1-2.

[82] Sources dated 1880 and 1879 are relied upon in Attachment F in identifying the boundaries of the South East People as consistent with the boundaries of the application area – at p. 2. In particular, Attachment F provides that one Bunganditj speaker from Padthaway informed researcher Taplin in 1879 that his country encompassed the area between Salt Creek, Galls Station and Padthaway – at p. 3. Salt Creek and Galls Station are places identified as within the application area, while I understand Padthaway is east of the application area, but within the area for the FNSE #1 application.

[83] It is reasonable to infer, in my view, that this informant would have been a member of the South East People in the area at the time of settlement, noting that he was an adult in 1879. In this way, I am satisfied the factual basis addresses an association of the predecessors of the group with the area at settlement.

[84] In addition to this, Attachment F also speaks of the remains of campsites found throughout the application area (at p. 12), and Attachment M speaks of bones found in places of significance in the area by a claimant – at p. 2. In my view, this information supports the long-term occupation and use of the area by the local Indigenous people, and from this, I consider I can infer the particular tribes identified in the anthropological research have inhabited the area since, and prior to, first European contact.

[85] There is also information before me addressing an association of the predecessors of the native title claim group with the area since the time of the apical ancestors. For example, Attachment F includes a statement from a claimant who explains that his great grandfather in the 1890s, and later his uncle and father and cousins, all spent time at Sandys Hut, within the application area. Another claimant explains that Salt Creek is where one of the apical ancestors, Whympie, is buried, and that she was taken there often when she was young by her father. She states that her grandmother and aunties would sometimes come on these trips. Another claimant is stated as recalling Sandys Hut as the place where many of his family lived and were born in earlier times – at p. 9.

[86] In light of this material, I consider the factual basis sufficient in supporting an assertion that the predecessors of the group have had an association with the area over the period since settlement.

[87] Regarding an association of the whole group with the area presently, Attachments F and M contain information about the time claim group members spend on the area. Attachment F includes a statement from a claimant about specific persons who currently visit and stay at Sandys Hut – at p. 9. Another elderly claimant tells how from time to time she still manages to visit the Granites, the southern Coorong and Sandys Hut – at pp. 8-9. From my own research, I understand all of these places to be located within the boundaries of the application area.

[88] In addition to this, Schedule G states that the main road from Kingston (just south of the application area) to Meningie (just north of the application area) across the application area is in regular use by members of the claim group. It states that those claimants have explained how, in the course of travelling the road, areas off the road are visited and resources of the area utilised.

[89] Elsewhere, in Attachment F, a claimant explains a creation story that relates to the place called the Granites – at p. 7. In this way, I consider the factual basis speaks to both a physical and spiritual association of the members of the group today with the application area.

[90] At s 190B(5)(a), the association asserted by the material must be shown to be with the entirety of the application area. As indicated above, using the Tribunal's Native Title Vision Plus database, I have mapped the places named in the material, being places the claim group and its predecessors presently have and previously had an association with, and considered their location in relation to the boundary of the application area. From this exercise, I am satisfied that those places are geographically spread across the application area, such that the association asserted is supported by the material as being an association with the entire area subject of the application.

[91] Consequently, I am satisfied the factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the land and waters of the application area.

Reasons for s 190B(5)(b)

[92] I am satisfied that the requirement at s 190B(5)(b) is met, as the factual basis is sufficient to support an assertion that there exist traditional laws acknowledged, and traditional customs observed, by the native title claim group giving rise to the claim to native title.

[93] The case law indicates the following is required of the material at s 190B(5)(b):

- information supporting the existence of a society of people living in the area at sovereignty, or at least European settlement, acknowledging laws and customs of a normative character – *Gudjala 2007* at [63];
- an explanation of how the laws and customs of the claim group are 'traditional', that is, how they have been passed down through the generations to the claim group and how they are rooted in the laws and customs of a society at sovereignty – *Yorta Yorta* at [46] and *Gudjala 2009* at [72];
- an explanation of the link between the claim group described in the application and the area covered by the application, which may require identification of a link between the apical ancestors named in Schedule A, and the society at sovereignty – *Gudjala 2007* at [66] and [81];
- evidence of the claim group's acknowledgement and observance of laws and customs in relation to the claim area – *Gudjala 2009* at [74].

[94] I have addressed each of these aspects of the requirement at s 190B(5)(b) below.

Does the factual basis address a pre-sovereignty society in the area acknowledging and observing normative laws and customs?

[95] I am satisfied the factual basis addresses a society at settlement in the area acknowledging and observing normative laws and customs.

[96] Attachment F provides that the pre-contact society from who the claim group are descended comprised three tribes: the Bunganditj, Potaruwutj and Meintangk – at p. 1. These names are taken from Tindale's map of the South East region, which identifies these tribes as

associated with the area covered by the application – at p. 1 and Figure 1 at p. 3. It explains that various spellings and variations of these names appear within historic sources, including Booandik/Buwandik and Moandik – at p. 1.

[97] Attachment F further provides that together, these tribes were a 'broadly defined cultural confederation of people, having discernable similarities of language and social organisation' – at p. 1. Elsewhere, it suggests that these three tribes spoke the same language, with varying dialects – at p. 2.

[98] More detail of this society, and the laws and customs of a normative character acknowledged and observed by those persons, is given in Attachment F which contains numerous excerpts from historical sources that address this subject – at pp. 10-17. These sources are dated as early as 1860 and give the following information about the persons inhabiting the application area and broader South East region:

- They camped throughout the area, and in doing so, used resources readily available from the area, including taking water from lagoons, and lighting fires for cooking and for warmth – at pp. 11-12.
- They regularly hunted and fished throughout the area, and took natural resources such as plants and roots for food and medicine – at pp. 10-12.
- They observed rules around totems, including avoidance of killing or eating one's totem – at p. 14.
- They gathered together with other neighbouring groups, for festivals (corroborees) and to trade, and travelled to other regions for this purpose. When participating in ceremony, they would use ochre and a natural substance from oyster shells to decorate their bodies – at pp. 11, 14.
- They told stories of their forefathers and taught their children to 'love their country' – at p. 14.
- They observed particular rituals and practices for marriage and burials – at p. 13.
- Dreaming stories known by these persons served to explain the creation of their country (including significant sites and boundaries), their relationship with neighbouring tribes, and the presence of spiritual forces within the landscape – at pp. 6-7.

[99] As explained above in my reasons at s 190B(5)(a), I have inferred from the material that settlement occurred in the area around the 1860s. From the information before me in Attachment F, set out above and extrapolated from sources dated as early as 1860, I am satisfied the factual basis addresses the presence of a society in the area at settlement acknowledging and observing normative laws and customs.

[100] Regarding a link between the apical ancestors and the society at settlement, Attachment F states that the apical ancestors named in Schedule A 'have been largely shown by genealogical and documentary research… to be either recorded as persons from these language groups, or to have been from and living in the South East' – at p. 2. Specifically here, Attachment F refers to genealogies prepared by Tindale and R. M. & C. Berndts in the late 1930s and early 1940s. Oral

history provided by claimants is said to confirm and support this assertion – at p. 2. In my view, this is sufficient in establishing a link between the apical ancestors and the society at settlement, namely, that the apical ancestors were persons who would have been born into the society sometime around the late 1800s.

Is the factual basis sufficient to support an assertion of traditional laws and customs of the claim group?

[101] Traditional laws and customs are those that have been passed down from generation to generation of a society, usually by word of mouth and common practice –*Yorta Yorta* at [46]. In my view, the material addresses the way knowledge of the group's laws and customs has been handed down to the claimants by their predecessors. For example, Attachment F includes a statement from a claim group member who explains regarding the site known as the Granites, that she 'always knew it was a special place', that she 'knew the rocks there were special'. She explains that she was told this by an elderly woman of the group when she was a child. Another claimant explains that he was told parts of the Granites mythological story when he was a boy – at p. 9. He further states that as a child he was allowed to go to the site, but was told 'to be respectful' and taught that if he wasn't respectful, a big wave washing in or some other form of punishment might come upon him – at p. 9.

[102] From the material, I understand that this practice of passing on knowledge to younger generations continues today. For example, Attachment M includes the following statement from a claimant:

> I like to teach the young people. We know about some important places. Some have men's business. Some have women's business. Jip Jip is one. It's a man's place. I don't go there myself – at p. 2.

[103] Information about the laws and customs of the claim group today is contained in these statements from claimants in Attachments F and M. For example, one claimant explains that as a child he would go with his parents to camp at the Granites. On the way there, he says that they would 'get bush tucker'. Upon arriving, they would set up a structure to provide shade, light a few fires for cooking, and get water from a nearby soak. Then they would do some fishing, getting cockles and some shellfish – at p. 9. Elsewhere, this claimant names particular members of the claim group who have recently camped out at the area, and also at Sandys Hut. He explains that his great grandfather spent time there in the 1890s, and later his uncle, his father and his cousins – at p. 9. From this, I understand the material to assert that members of the claim group today continue to camp at particular sites within the application area, and utilise the resources of the area, according to the pattern they were shown by their predecessors, and passed down through the generations since the late 1800s.

[104] Knowledge of country, including its boundaries and significant sites, is another aspect of the laws and customs of the claim group that, in my view, the material indicates has been passed down to the claim group today through the generations. One claimant explains that Salt Creek is

where one of the apical ancestors, Whympie, is buried. She explains how her Dad took her there as a child and taught her that that place marked the boundary of her country. She goes on to describe how an elderly member of the group taught her about the Granites and the fact that it was a special place – at p. 9. In Attachment M, this same claimant tells of how she has taken her 12 year-old grandson to a number of places significant to the group and taught him to respect those places – at p. 2. As above, another claim group member recalls in the material how he was taught to be respectful of the Granites when playing on the rocks there – Attachment F at p. 9.

[105] I note above, that Attachment F contains information from historical sources, including a source from the 1880s, which explains that the Booandik people showed great pride in their land, and taught their children to love their country – at p. 14. In this way, I understand this knowledge about country, including knowledge of the boundaries of the group's traditional country, and knowledge of special places within the area and how those places are to be treated, is an aspect of the laws and customs of the society at settlement that has been passed down through the generations to the claim group today.

[106] As set out in my reasons above, Attachment F states that the pre-contact society was comprised of three tribes, or three identifiable social groups. Attachment F explains, however, that today these divisions have become further amalgamated such that the First Nations of the South East people is comprised primarily of family group divisions – at p. 3. Despite this, in my view, the material indicates that members of the claim group continue to identify with the 'tribal' divisions that existed in pre-contact times. This includes an understanding by claim group members that they are a distinct group from the neighbouring Ngarrindjeri. For example, one claimant states that 'Buwandik' country goes up as far as Salt Creek – at p. 4. Another claimant explains that the group's Dreaming is along the Coorong, and refers to the trees at Salt Creek and a place known as Pungkung as the boundary of her country. She says that 'Moandik people were in that country' – at p. 4. From this information, I consider the material supports the tribal names and/or social divisions as an aspect of the group's laws and customs that has been passed down to the claim group through the preceding generations.

[107] One further example of an aspect of the group's current laws and customs that the material supports as being handed down through the generations since settlement is creation or Dreaming mythologies. Attachment F contains excerpts from two separate historical sources setting out the story of the mythical ancestral being, *Ngurunderi*, and the battle he has with another ancestral being when he travels south from the Murray region into that being's territory – at pp. 6-7. Following this, Attachment F sets out a claimants' version of the story, where this being comes down from the north and starts to kill all of the animals that the other ancestral being had created for the Buwandik region. The claimant states that 'other people know that story too', and elsewhere he explains that he was taught the story as a boy, and then in greater detail as an adult

– at p. 7. From this, I consider it reasonable to infer that this and other mythological stories have been passed down through the generations to the members of the claim group today.

[108] Noting the examples set out above, of various 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 is my view that the factual basis speaks to 'traditional' laws and customs. That is, the material speaks to laws and customs rooted in those of the society at settlement. It follows that I am satisfied the factual basis is sufficient to support an assertion that there exist traditional laws and customs acknowledged and observed by the claim group today giving rise to the claim to native title.

Reasons for s 190B(5)(c)

[109] The application satisfies the condition of s 190B(5)(c) because the factual basis is sufficient to support an assertion that the native title claim group have continued to hold their native title in accordance with the group's traditional laws and customs.

[110] The case law indicates the following matters must be addressed by the factual basis at this condition of the registration test:

- 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 – *Gudjala 2007* at [82].

[111] I have already set out above at s 190B(5)(b), the reasons for which I am satisfied the factual basis material speaks to a society at settlement in the area acknowledging and observing normative laws and customs, from which the present laws and customs were derived. In my view, the material also addresses the way in which those laws and customs have been acknowledged and observed by the group and its predecessors without substantial interruption since settlement – see *Yorta Yorta* at [87].

[112] Firstly, the material speaks to claimants recalling stories about their ancestors that have been passed down through the generations. For example, as above, Attachment F contains a statement from a claimant about time spent at Sandys Hut. The claimant explains that his great grandfather was there in the 1890s, and then later his uncle, his father and his cousins – at p. 9. Another claimant explains that apical ancestor Whympie is buried at a place called Pungkung near Salt Creek in the application area. She tells of the many times she and her family went camping there – at p. 9. This claimant also recalls her ancestor Queen Ethel, the sister of apical ancestor Whympie, living with her and her family at Blackford, in the vicinity of the application area. She says that Queen Ethel taught her about bush tucker – Attachment M at p. 2.

[113] These recollections of claimants' ancestors tell of how those persons lived and camped within, and used the natural resources of, the application area. As set out above at s 190B(5)(b), it is my view that living in and camping throughout the application area, including using the resources of the area for sustenance, are activities carried out pursuant to and in accordance with the traditional laws and customs of the group. In this way, I consider the material speaks to the acknowledgement and observance of these laws and customs across the generations since settlement and prior.

[114] Secondly, the material explains that certain members of the claim group reside within the application area today, including at Sandys Hut. As set out above, there are a number of references in the material to members of the group and their predecessors living and camping at places within the application area. There are also a number of references to historical sources which record the way in which the Booandik and Moandik people camped and lived at places within the application area – see for example Attachment F at p. 12. Further, the material states that remnants of campsites can be found throughout the application area, and a claimant explains in Attachment M that during visits to special places within the group's traditional country, sand drifts sometimes uncover bones – at p. 2. In my view, this information goes to supporting occupation of the area prior to settlement.

[115] From this, it is my understanding that the material asserts the members of the group and their predecessors have maintained a physical and spiritual connection with the application area since settlement and prior to that time. Following from that assertion, I consider it reasonable to infer that the members of the group and their predecessors have continued to acknowledge and observe their traditional laws and customs in the area without interruption. These laws and customs have been passed down from generation to generation to the claim group today according to traditional patterns of teaching.

[116] It follows that I am satisfied the factual basis is sufficient to support an assertion that the system of traditional laws and customs acknowledged and observed by the claim group is one that has had 'a continuous existence and vitality' since settlement – see *Yorta Yorta* at [47].

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.

[117] The application satisfies the condition at s 190B(6), as I consider the following non-exclusive native title rights and interests established on a prima facie basis:

- the right to access and move about the application area;
- the right to live, to camp and to erect shelters and other structures on the application area;

- the right to hunt and fish on the land and waters of the application area without the limitation of what purpose;
- the right to gather and use the natural resources of the application area such as food, medicinal plants, wild tobacco, timber, resin, rock, ochre and feathers;
- the right to share and exchange the subsistence and other traditional resources of the application area;
- the right to use and take the natural water resources of the application area;
- the right to cook on the application area and to light fires for domestic purposes but not for the clearance of vegetation;
- the right to engage and participate in cultural activities on the application area including those relating to birth and death;
- the right to conduct ceremonies and hold meetings on the application area;
- the right to teach on the application area the physical and spiritual attributes of locations and sites within the application area;
- the right to visit, maintain and protect sites and places of cultural and religious significance to the native title holders;
- the right to be accompanied on the application area by non-native title holders.

[118] The condition at s 190B(6) will be met even if only some of the native title rights and interests claimed can be prima facie established – see *Doepel* at [16].

[119] The case law indicates the test at s 190B(6) requires 'some measure of the material available in support of the claim' – *Doepel* at [126]. In applying the standard of 'prima facie', I am to consider 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' – *Doepel* at [135].

[120] In undertaking the task at this condition, I have also considered whether each right or interest satisfies the definition of 'native title rights and interests' at s 223(1). That is, does the material provide prima facie support for the right or interest as one that is:

- held pursuant to the traditional laws and customs of the native title claim group;
- a right or interest in relation to land or waters; and
- recognised by the common law of Australia.

[121] Where a right or interest does not meet the requirements of that definition, it is my view that it cannot be, prima facie, established at s 190B(6).

[122] I have addressed the material in support of each right or interest claimed below.

Consideration

Right of exclusive possession

[123] The nature of a native title right to exclusive possession was discussed in *Western Australia v Ward* [2002] HCA 28 (*Ward*), 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 – at [88].

[124] Since *Ward*, 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 – *Sampi v State of Western Australia* [2005] FCA 777 at [1072];
- the right cannot be formally classified as proprietary - its existence depends on what the evidence discloses about its content under traditional law and custom – *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*) at [71];
- 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' – *Griffiths* at [127].

[125] In my view, the material contains scarce information addressing these elements of a native title right to exclusive possession. Attachment F provides information from various historical and anthropological sources in support of an association of the claim group and its predecessors with the application area, such that I can consider those persons 'inhabited' and 'occupied' the area, however the information supporting an exclusive right of those persons to the area is insufficient.

[126] The relevant information consists of three excerpts from historical sources. The first of these, dated 1983, explains that the people from the South East were clearly divided into landowning units and that 'each horde owned an area which they regarded as theirs and which passed down from generations to generations' – at p. 15. The second excerpt is taken from the same source, and it provides that the 'land "owned" by a horde was carefully marked out and jealously guarded'. It states that 'any trespass upon it without prior agreement led to violent disputes' – at p. 15. The final excerpt, dated 1934, explains how stock drovers requested that their Aboriginal guide take them to a burial site in the vicinity of Salt Creek, and the boy refused, saying it 'would mean death to him' – at p. 15.

[127] I note that the first two excerpts, while indicating the existence of rules around who could access certain areas and the enforcement of those rules by land-owning groups, refer only to the 'people from the South East', and do not provide any examples of the laws and customs having been observed and documented specifically in relation to the claim area. In my view, therefore, they do not constitute sufficient support for the prima facie establishment of the right as held by the claim group in the claim area. The third excerpt does relate to the claim area, but it is somewhat ambiguous on what basis or how the trespassing guide would suffer 'death' should he enter the restricted burial area. The guide may have believed spiritual forces in that area would bring about the punishment he spoke of, rather than the inhabitants of the area themselves. In my

view, of itself this excerpt does not provide prima facie support for a right of the claim group to exclude others not of the group from the application area.

[128] In addition to this, Attachment F includes quotes from claim group members about their association with the area, including quotes such as '[o]ur family history is that we are Aboriginal people from the Mount Gambier region and that the country went up that far', and 'Moandik people were in that country', and 'Salt Creek, we always thought of it as the boundary with the Ngarrindjeri' – at pp. 3-4. These quotes do not address, however, ways in which the group and its predecessors were able to exclude others from their country. Claim group members do not talk about a right to speak for that country, or a right to exercise decision-making authority over what happens within that territory and/or who can access the area.

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

Non-exclusive right to access and move about the area

[130] As above, there are a number of quotes from members of the claim group that explain the way they and their predecessors before them have spent time on the application area, including to live, camp, hunt, fish, gather resources and to teach and learn about country and special places within the area. Attachment F also contains historical and anthropological sources that talk about the groups' predecessors travelling across country to trade with neighbouring groups and participate in ceremonies – at pp. 11, 14.

[131] In my view, this information is sufficient to allow me to consider a non-exclusive right to access and move about the area, prima facie, established.

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

[132] An example of the material before me that speaks to this right is in Attachment F where one claimant explains how his great grandfather lived at Sandys Hut in the 1890s, and then his uncle and father and cousins in later periods. He explains that his predecessors had built houses, that is, huts or shacks, to live in. He also explains that his family would go camping at the Granites in the summertime and to set up, they would erect a shade shelter.

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

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

[134] Attachment F contains excerpts from various historical sources that speak to this right being exercised by the predecessors of the group. These excerpts explain the techniques and methods used by these people to take animals from the land and waters, including kangaroo, emu, wild turkey, seabirds, crayfish, crabs, and stranded seals and whales – at pp. 10-11. Elsewhere in

Attachments F and M, claimants describe the way they have fished and hunted in the application area – for example Attachment F at p. 9.

[135] 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

[136] One example of the information addressing this right is in an excerpt from a historical source in Attachment F, which explains that the Indigenous inhabitants of the application area would paint themselves with red ochre and a whitening substance taken from oyster shells when preparing for ceremony – at p. 14. Other excerpts talk about the predecessors of the group gathering roots and seeds for food and medicine – at p. 10.

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

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

[138] Attachment F contains information addressing this right, namely excerpts from historical and anthropological sources describing the trade routes that ran through and across the application area. One excerpt refers to a route running along the Coorong down to the South East, where bush potatoes, radishes, yams, smoke-dried freshwater fish, red ochre and other resources from the area were exchanged – at p. 11.

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

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

[140] Attachment F contains information about this right in an excerpt from a historical source about the Booandik people, where these people took water from a lagoon – at p. 11. Elsewhere in Attachment F, a claimant describes how as a child camping at the Granites, he would take water from soaks in the area – at p. 9.

[141] In my view, this information 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

[142] Again, an excerpt from a historical source about the Booandik people in Attachment F speaks to this right, explaining that these people made a fire to boil a billy, and to cook food in the hot ashes – at p. 12. Elsewhere, a claimant describes lighting a fire when he and his family camped at the Granites – at p. 9.

[143] In my view, this information 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

[144] This right described in Schedule E refers in particular to activities relating to birth and death. Attachment F contains an excerpt from a historical source that talks about a particular ritual followed by the predecessors of the claim group involving 'platform burials' that took place on a small island on a lagoon near Salt Creek (in the application area) – at p. 13.

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

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

[146] Attachment F contains a number of references to predecessors of the claim group engaging in ceremonies. In particular, one excerpt from a historical source about the Booandik people describes how they used natural substances from the application area to decorate themselves for ceremony – at p. 14. Another excerpt talks about how the Indigenous people of Kingston and the Coorong would gather with neighbouring groups to trade and for corroborees – at p. 14. Attachment F also explains that one of the group's predecessors, Ethel Whympie (brother of apical ancestor Whympie), was interviewed by a local newspaper regarding the 'coronation' of her aunt, Queen Catherine Gibson (apical ancestor for the claim). The article explains that the event involved days of hunting, dancing and 'making feast' – at p. 14.

[147] 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

[148] As above, Attachment F contains a number of excerpts from a historical source dated 1880 about the Booandik People. One excerpt states that these people spoke proudly of their land and their forefathers and 'taught their children to love their country' – at p. 14. Elsewhere, one claimant explains how she takes her grandson out on country and teaches him about bush tucker, and about special places within the application area – Attachment M at p. 2.

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

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

[150] As above, one claimant explains how she has taken her 12 year-old grandson out onto the application area to show him particular sites and places of importance. She states that Jip Jip is an important place that is a men's business place, and for that reason she doesn't visit it – Attachment M at p. 2. Elsewhere another claimant explains how he was taught to respect

particular sites within the application area – Attachment F at p. 9. From this information, I understand that the claim group considers and their predecessors considered, certain sites to be of significance, and therefore, requiring protection and/or special treatment. It is further my understanding that claimants assert that they possess the right to take action to ensure this outcome, pursuant to their laws and customs.

[151] 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

[152] In another excerpt from the 1880 source about the Booandik people, the author explains how she accompanied some of these people in their travels through the area, and the way in which they lent themselves as her guides – Attachment F at p. 15. Elsewhere, Attachment F contains information about gatherings of the claim group and its predecessors with neighbouring groups – at p. 14. From this, I understand that those persons would have had to accompany the claim group's predecessors into the application area.

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

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.

[154] The application satisfies the condition at s 190B(7) because I am satisfied that at least one member of the native title claim group has a traditional physical connection with part of the application area.

[155] 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 – *Doepel* at [17];
- the physical connection must be shown to be in accordance with the traditional laws and customs of the claim group – *Gudjala 2007* at [89];
- the material may need to address an actual presence on the area – *Yorta Yorta* at [184].

[156] Noting that the focus of the condition is to be upon one member of the native title claim group, I have set out below the information before me that I consider addresses the physical connection of claimant [name removed] with the application area:

- he lived at Sandys Hut in a shack when he was a child, with his father, and during that time he accessed and used the surrounding area, including the southern Coorong – Attachment F at p. 9;
- as a child he would go with his family to camp at the Granites in the summertime – he would fish there and gather shellfish – at p. 9;
- as a child at the Granites he would play on the rocks – he was taught to respect that place by his elders, and was taught the Dreaming stories for that place – at p. 9;
- he continues to visit Sandys Hut – at p. 9;
- he was taught about the boundaries of his country – at p. 3.

[157] From this information, I am satisfied that [name removed] has had a physical connection with part of the application area. I am also satisfied that the material supports this physical connection as being a traditional one. I have set out above in my reasons at s 190B(5)(b), various aspects of the system of traditional laws and customs asserted within the material. These include creation stories and mythologies, access to and use of the resources of the area, and the passing on of knowledge about country. As discussed above, this includes knowledge of the boundaries of one's country and special places within it, and the requirement that those places be treated with respect. In my view, the information in Attachments F and M about [name removed], set out above, indicate that his connection with the application area is in accordance with these aspects of the group's laws and customs. It follows that I am satisfied [name removed] has and previously had, a traditional physical connection with the application area.

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

> The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.
> Section 61A provides:
> (1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
> (2) If:
> (a) a previous exclusive possession act (see s 23B) was done in relation to an area; and
> (b) either:

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

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

(3) If:

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

(b) either:

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

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

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

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

(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

[158] 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)

[159] 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 assessment provides that there are no determinations of native title covering any part of the application area.

Section 61A(2)

[160] 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. Schedule B states that the application area excludes any land or waters that is or has been covered by a previous exclusive possession act.

Section 61A(3)

[161] 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. Paragraph 3 of Schedule B provides that 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.

Conclusion

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

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

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

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

Section 190B(9)(a)

[164] Schedule Q provides that the native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

Section 190B(9)(b)

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

Section 190B(9)(c)

[166] Paragraph 6 of Schedule B states that the application area excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.

Conclusion

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

[End of reasons]

Attachment A

Summary of registration test result

Application name	**First Nations of the South East #2**
NNTT file no.	**SC2017/001**
Federal Court of Australia file no.	**SAD180/2017**
Date of registration test decision	**6 October 2017**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s 190C(2)			**Aggregate result:** **Met**
	re s 61(1)		**Met**
	re s 61(3)		**Met**
	re s 61(4)		**Met**
	re s 62(1)(a)		**Met**
	re s 62(1)(b)		**Aggregate result:** **Met**
		s 62(2)(a)	**Met**
		s 62(2)(b)	**Met**
		s 62(2)(c)	**Met**
		s 62(2)(d)	**Met**
		s 62(2)(e)	**Met**
		s 62(2)(f)	**Met**
		s 62(2)(g)	**Met**
		s 62(2)(ga)	**Met**

Test condition	Subcondition/requirement		Result
		s 62(2)(h)	Met
s 190C(3)			Not met
s 190C(4)			Overall result: Met
	s 190C(4)(a)		Met
	s 190C(4)(b)		Met

Section 190B conditions

Test condition	Subcondition/requirement	Result
s 190B(2)		Met
s 190B(3)		Overall result: Met
	s 190B(3)(a)	NA
	s 190B(3)(b)	Met
s 190B(4)		Met
s 190B(5)		Aggregate result: Met
	re s 190B(5)(a)	Met
	re s 190B(5)(b)	Met
	re s 190B(5)(c)	Met
s 190B(6)		Met
s 190B(7)(a) or (b)		Met
s 190B(8)		Aggregate result: Met
	re s 61A(1)	Met
	re s 61A(2) and (4)	Met

Test condition	Subcondition/requirement	Result
	re ss 61A(3) and (4)	**Met**
s 190B(9)		**Aggregate result:** **Met**
	re s 190B(9)(a)	**Met**
	re s 190B(9)(b)	**Met**
	re s 190B(9)(c)	**Met**

[*End of document*]