

Registration Decision

Application name	Caroline Wilson and Ors on behalf of the Wirangu No 3 Native Title Claim and the State of South Australia (Wirangu No 3)
Name of applicant	Caroline Wilson, Elizabeth Pool, Kenneth Wilson, Cindy Morrison, Neville Miller, Vernon (Penong) Miller, Barry Dean (Jack) Johncock
Federal Court of Australia No.	SAD228/2019
NNTT No.	SC2019/002
Date of Decision	20 March 2020

Claim accepted for registration

I have decided that the claim in the Wirangu No 3 application does satisfy 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.

Radhika Prasad

*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 27 July 2018 and made pursuant to s 99 of the Act

Reasons for Decision

CASES CITED

AB (deceased) (on behalf of the Ngarla People) v State of Western Australia (No 4) [2012] FCA 1268 (Ngarla)

Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215 (Anderson)

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

De Rose v South Australia [2002] FCA 1342 (De Rose)

Evans v Native Title Registrar [2004] FCA 1070 (Evans)

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (Warrie)

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 FC)

Gudjala People #2 v Native Title Registrar [2009] FCA 1572 (Gudjala 2009)

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5) [2003] FCA 218 (Harrington-Smith (No 5))

Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9) [2007] FCA 31 (Harrington-Smith (No 9))

Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales [2002] FCA 1517 (Lawson)

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

McGlade v South West Aboriginal Land & Sea Council Aboriginal Corporation (No. 2) [2019] FCAFC 238 (McGlade No 2)

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

Mundraby v Queensland [2006] FCA 436 (Mundraby)

Northern Land Council v Quall [2019] FCAFC 77 (Quall)

Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135 (Alyawarr)

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

Risk v National Native Title Tribunal [2000] FCA 1589 (Risk)

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

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

Wakaman People #2 v Native Title Registrar [2006] FCA 1198 (Wakaman)

Ward v Northern Territory [2002] FCA 171 (Ward)

Weribone on behalf of the Mandandanji People v State of Queensland [2013] FCA 255 (Weribone)

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

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

Wiri People v Native Title Registrar [2008] FCA 574 (*Wiri People*)

BACKGROUND

- [1] The application was filed on behalf of the Wirangu native title claim group. It covers a number of land parcels in the Eyre Peninsula.
- [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 28 October 2019 pursuant to s 63 of the Act.
- [3] In November 2019, a delegate of the Registrar provided a preliminary assessment to the applicant, showing deficiencies in the application. The applicant advised on 12 November 2019 that it would take steps to rectify the deficiencies including amending the application and provided additional information to meet some of the registration conditions. The applicant also requested the registration test not be applied until the application was amended.
- [4] In December 2019, I took carriage of this matter and requested the senior officer to write to the applicant and, among other things, clarify some of the deficiencies noted in the earlier preliminary assessment.
- [5] On 30 January 2020, the applicant's representative advised that the applicant anticipated being in a position to file an amended application by 14 February 2020.
- [6] The applicant filed an interlocutory application to amend the application which was listed before the Court on 28 February 2020. Leave was granted by White J to amend the application.
- [7] Also on 28 February 2020, the applicant's representative wrote to the senior officer advising that leave was granted to amend the application in the form it was filed on 27 February 2020. The applicant's representative advised that they would provide additional information in support of certification and that the applicant continued to rely on the additional material provided in November 2019 for the purposes of registration. In a separate email, the applicant's representative provided the additional information in support of certification of the application.
- [8] On 2 March 2020, a copy of the amended application was provided to the Registrar pursuant to s 64(4). I have therefore proceeded to consider this amended application for registration as shown in my reasons below.
- [9] As discussed in my reasons below, I consider that the claim in the application satisfies all of the conditions in ss 190B and 190C and therefore it must be accepted for registration.³

Information considered

- [10] In reaching this decision, I have considered s 190A(3) which directs me to have regard to certain information when testing an application for registration. I understand this provision to

³ Section 190A(6). Attachment A contains the information that must be included on the Register of Native Title Claims (the Register).

stipulate that the application and information in any other document provided by the applicant is the primary source of information for the decision I make. Accordingly, I have taken into account the following material:

- the information contained in the application and accompanying documents;
- the additional material provided by the applicant on 12 November 2019 and 28 February 2020;
- the geospatial assessment prepared by the Tribunal's Geospatial Services on 9 March 2020; and
- the results of my own searches using the Tribunal's registers and mapping database.

Procedural fairness process

[11] As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness. Those rules seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication.⁴ The steps undertaken to ensure procedural fairness is observed are as follows:

- On 3 March 2020, the senior officer for this matter sent a letter to the State of South Australia (the State) informing the State that any submission in relation to the registration of this claim should be provided by 9 March 2020.
- The senior officer, also on 3 March 2020, wrote to inform the applicant that any information additional to the application and the information provided on 12 November 2019 and 28 February 2020 should be provided by 9 March 2020.
- On 11 March 2020, the senior officer wrote to inform the State that additional information had been received by the applicant and if the Minister wished to receive a copy to provide comments in relation to registration, they should advise by 12 March 2020.
- On 12 March 2020, the State advised that the Minister did not wish to comment on or respond to the additional material provided by the applicant in this matter.

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

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

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

⁴ *Hazelbane v Doepel* at [23] – [31].

What is required to meet this condition?

[13] In coming to the above conclusion, I understand that the condition in s 190C(2) 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 go beyond the information in the application itself nor undertake any merit or qualitative assessment of the material for the purposes of s 190C(2).⁵ Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s 190C(2).

[14] 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 ss 61(2) and (5), as those subsections either impose no obligations of this nature in relation to the application or are already tested where required by those parts of ss 61 and 62.

Does the claim contain the prescribed information and is it accompanied by prescribed documents?

[15] The claim meets this condition because it does contain the prescribed details and other information and is accompanied by the prescribed affidavits, as set out below.

Applications that may be made: s 61(1)

[16] Schedule A of the application provides a description of the native title claim group and the s 62 affidavits indicate that the persons comprising the applicant are included in the native title claim group.⁶ There is nothing on the face of the application that causes me to conclude that the requirements of this provision, under s 190C(2), have not been met.

Applicant's name and address for service: s 61(3)

[17] Part B of the application contains the name and address for service of the applicant's representative.

Applications authorised by persons: s 61(4)

[18] I consider that Schedule A of the application contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

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

[19] The application is accompanied by affidavits affirmed by each of the persons who comprise the applicant. The affidavits contain the statements required by s 62(1)(a)(i) to (v), including stating the basis on which the applicant is authorised as mentioned in subsection (iv).

Information about the boundaries of the area covered by the application and any areas within those boundaries not covered and map showing the boundaries: s 62(2)(a) & (b)

[20] Schedule B contains information that allows for the identification of the boundaries of the area covered by the application. That schedule also contains information of areas within those boundaries that are not covered by the application.

⁵ *Doepel* at [16], [35] – [37] and [39].

⁶ At [4].

[21] Attachment C contains maps showing the boundaries of the application area.

Searches of any non-native title rights and interests carried out: s 62(2)(c)

[22] Schedule D provides that no searches have been carried out to determine the existence of non-native title rights and interests in relation to the land or waters in the area covered by the application.

Description of native title rights and interests claimed in relation to particular land or waters: s 62(2)(d)

[23] 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 appears at Schedule E. The description does not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

General description of factual basis for assertion that native title exists: s 62(2)(e)

[24] Schedule F and Attachment F contains information pertaining to the factual basis on which it is asserted that the rights and interests claimed exist. I note that there may also be other information within the application that is relevant to the factual basis.

Activities: s 62(2)(f)

[25] Schedule G contains details of the activities currently undertaken by members of the claim group on the land and waters of the application area.

Other applications: s 62(2)(g)

[26] Schedule H provides details of other applications that seek a determination of native title or a determination of compensation in relation to native title have been or previously were made in relation to the application area.

Future act notices: ss 62(2)(ga) and (h)

[27] Schedule HA provides that the applicant is not aware of any notifications given in accordance with paragraph 24MD(6B)(c) that have been given and that relate to the whole or part of the area.

[28] Schedule I provides that the applicant is not aware of any notices issued under s 29 that have been given in relation to the application area.

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

[29] As indicated in my reasons below, the application satisfies the condition of s 190C(3).

[30] In my view, this condition requires that the Registrar be satisfied that there are no common claimants where there is a previous application that comes within the terms of subsections (a) to (c).⁷

[31] Although the text of this provision reads in the past tense, I consider the proper approach would be to interpret s 190C(3) in the present tense as to do otherwise would be contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill

⁷ *Strickland FC* at [9].

1997 provides that the ‘Registrar must be satisfied that no member of the claim group for the application ... is a member of the claim group for a registered claim which was made before the claim under consideration, which is overlapped by the claim under consideration and which itself has passed the registration test’.⁸ The explanatory memorandum further discusses the general discouragement of overlapping claims by members of the same claim group and encouragement of consolidation of such multiple claims into one application.⁹

- [32] I understand from the above that s 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in common with an overlapping claim that is on the Register when the registration test is applied. I consider that this approach, rather than a literal approach, more accurately reflects the intention of the legislature.
- [33] I note that in assessing this requirement, I am able to address information which does not form part of the application.¹⁰
- [34] I also note that in reaching my view, I understand the nature of the Registrar’s task here is not to find ‘in all respects the real facts on the balance of probabilities, or on some other basis’ or ‘to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application’.¹¹
- [35] The geospatial assessment identifies the Wirangu No 2 (SAD6019/1998) native title determination application as covering the area of the current application. However, Schedule B specifically excludes this application.
- [36] The geospatial assessment also identifies the Nauo #3 (SAD63/2018) native title determination application as covering part of the area of the current application. I have undertaken a search of the Tribunal’s mapping database and confirm that this application overlaps the current claim area. In my view, the Nauo #3 application meets the condition specified under subsection (a).
- [37] Subsection 190C(3)(b) requires the application to be on the Register when the current application was made. I have undertaken a search of the Register and this revealed that the Nauo #3 application is not on the Register. Therefore, the Nauo #3 application does not meet the condition specified under subsection (b).
- [38] I am therefore satisfied that there is no previous application to which ss 190C(3)(a) to (c) apply. Accordingly, I do not need to consider the requirements of s 190C(3) further.

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

- [39] For the reasons set out below, I am satisfied that the requirements set out in s 190C(4)(b) are met.

⁸ At 29.25, emphasis added.

⁹ At 35.38.

¹⁰ *Doepel* at [16].

¹¹ *Doepel* at [16]; see also *Dann* at [21].

What is needed to meet this condition?

I must be satisfied that either the certification or authorisation requirements set out in ss 190C(4)(a) or (b) respectively are met, in order for the condition of s 190C(4) to be satisfied.

[40] Attachment R contains the certificate of the representative body. Accordingly, I am of the view that it is necessary to consider whether the requirements of s 190C(4)(a) are met. If these requirements are not met, I will proceed to consider whether the requirements of s 190C(4)(b) are met.

Section 190C(4)(a)

What is required to meet the condition at s 190C(4)(a)?

[41] Section 190C(4)(a) requires the Registrar to be ‘satisfied about the fact of certification by an appropriate representative body’, but is not to ‘go beyond that point’ and ‘revisit’ or ‘consider the correctness of the certification by the representative body’.¹² I therefore consider that my task here is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.

[42] Once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to ‘address the condition imposed by s 190C(4)(b)’.¹³

Does the certifying body have the power to certify?

[43] Attachment R provides that:

The Directors of South Australian Native Title Services Ltd [SANTS], have been provided information regarding the new claim to crown land parcels within the external boundaries of the current Wirangu No. 2 claim and that a Wirangu No. 3 Claim was authorised at authorisation meetings by the Wirangu claimants on 24 August 2018, and have independently considered that information ...

[44] The certificate is signed by two directors of SANTS noting that it is ‘duly authorised for and on behalf of’ SANTS.

[45] The certificate does not indicate that the application has been certified pursuant to s 203BE of the Act, but I understand that the certification has taken place under this provision.¹⁴

[46] The geospatial assessment identifies SANTS to be the only representative body for the area covered by the application.

[47] I note that in *McGlade No 2*, the Full Federal Court considered, among other things, the representative body’s certification of an indigenous land use agreement. The Full Court was asked to consider this question following another decision by the Full Court in *Quall* where it was held that the certification function of the relevant representative body under s 203BE(1)(b) of the Act was to be performed by the body itself and could not be delegated to anyone, including the body’s Chief Executive Officer (CEO).

[48] In relation to the performance of functions and exercise of powers of an Aboriginal and Torres Strait Islander (ATSI) corporation, such as a representative body, registered under the

¹² *Doepel* at [72], [78], and [80] – [82]; see also *Wakaman* at [32].

¹³ *Doepel* at [80].

¹⁴ See note to s 190C(4)(a) which allows an application to be certified under s 203BE.

Corporations (Aboriginal & Torres Strait Islander) Act 2006 (Cth) (CATSI Act), the Full Court in *McGlade No 2* concluded that:

In conducting its business, which includes performing any functions conferred on it and exercising its powers, an ATSI corporation does so through its directors and/or its authorised employees and agents. A function so performed is properly characterised as the performance of the function by the ATSI corporation itself, not a CEO or anyone else. *Quall* in no way precludes this conclusion.

That a function is that of the ATSI corporation itself is so, irrespective of whether the directors delegate a power to an employee or agent such as the CEO, and irrespective of whether under the replaceable rules in the CATSI Act or the rules of the ATSI corporation. Such a delegation does not amount to the delegation by the ATSI corporation of its function or a power to another person; rather, it has the limited effect of altering how and through whom the ATSI corporation fulfils its function (or an aspect of the function).¹⁵

[49] The Full Court distinguished *Quall* noting that that decision concerned a body established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

[50] I understand that SANTS is registered as a public company limited by guarantee pursuant to the *Corporations Act 2001* (Cth) (Corporations Act). Given that s 198D of the Corporations Act reflects s 274-10 of the CATSI Act, which relates to delegation of powers, I understand that by analogy the conduct of business of representative bodies incorporated under the Corporations Act can also be distinguished from *Quall*.

[51] Having regard to the above information and noting that I am to be satisfied of the fact of certification and not consider the correctness of that certification, I am of the view that SANTS was the relevant representative body for the application area and that it was within its power to issue the certification.

Have the requirements of s 203BE been met?

[52] To meet the requirements of this condition, the certification must comply with the provisions of s 203BE(4)(a) to (c).

[53] The certification complies with s 203BE(4)(a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters 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.¹⁶

[54] The certification, however, does not comply with s 203BE(4)(b) as it does not set out any reason for being of the above opinion.

[55] Subsection 203BE(4)(c) applies where the application area is covered by an overlapping application for determination of native title.

[56] Subsection 203BE(3) sets out the steps that a representative body must take if there are overlapping applications. In short, a representative body must use reasonable efforts to achieve agreement between competing claimants and minimise the number of applications being made. That subsection further provides that a failure by the representative body to

¹⁵ At [329] – [330].

¹⁶ At [2].

comply with this subsection does not invalidate any certification of the application by the representative body.

[57] The certificate also does not contain information about the steps taken by SANTS in relation to overlapping applications. However, this particular failure does not invalidate the certificate.

[58] Given the certificate does not meet the requirements of s 203BE(4)(b), I am not satisfied that the criteria under s 190C(4)(a) have been met. I must therefore consider the remaining conditions of s 190C(4), namely whether the requirements of s 190C(4)(b) are met.

Section 190C(4)(b)

Does the application contain the information specified in s 190C(5)?

[59] Section 190C(5) contains a threshold test that must be met before the Registrar may be satisfied that the applicant is authorised in the way described in s 190C(4)(b). Section 190C(5) provides that the application must include a statement to the effect that the requirement set out in s 190C(4)(b) has been met and briefly set out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met.

[60] I note that the following statement is made in all the affidavits of the persons comprising the applicant:

I am a member of the Wirangu Native Title claim group and I am authorised to be one of the persons who comprise the Applicant by all the persons in the Wirangu Native Title claim group by a resolution passed at a Wirangu Community Meeting at Port Lincoln on 2 August 2019 and to make this application and to deal with matters arising in relation to it.¹⁷

[61] In my view, the above constitutes a statement to the effect that the requirement in s 190C(4)(b) has been met and a brief outline of the grounds on which the applicant considers the Registrar should be satisfied that the requirements of s 190C(4)(b) are met. I assess whether the material provided addresses those requirements below.

What is required to meet the condition at s 190C(4)(b)?

[62] I understand that:

- section 190C(4)(b) requires the Registrar to be satisfied that the applicant has been authorised by all members of the native title claim group, which ‘clearly ... involves some inquiry through the material available ... to see if the necessary authorisation has been given’;¹⁸
- this condition requires the Registrar to be satisfied as to the identity of the claimed native title holders, including the applicant, and that the applicant needs to be authorised by all the other persons in the native title claim group;¹⁹
- this condition is not ‘to be met by formulaic statements in or in support of applications’;²⁰
- pursuant to s 251B, if there is a traditionally mandated decision making process, then that process must be followed to authorise the applicant, otherwise the process utilised for

¹⁷ At [4].

¹⁸ *Doepel* at [78].

¹⁹ *Wiri People* at [21], [29] and [35]; see also *Risk* at [60].

²⁰ *Strickland* at [57].

authorisation must be one that has been agreed to and adopted by the native title claim group.²¹

What information has been provided in relation to this condition?

[63] In addition to the information identified above in relation to s 190C(5), the affidavits provide the following information about the authorisation meeting:

5. As there is no traditional Wirangu decision-making process for dealing with matters arising under the [Act], at the Wirangu Community Meeting on 2 August 2019, the Wirangu claim group agreed to adopt the process which has been followed at Wirangu claim group meetings which is that:

- (a) there be a reasonable opportunity for informed discussion about each matter before a decision is made in relation to it;
- (b) the meeting confirms that there is no decision-making process under traditional law and custom that the Wirangu Claimant Group must use for making decisions of this kind relating to native title;
- (c) each Wirangu Person present at the meeting over the age of 18 has a right to vote upon any resolution that is considered at the meeting;
- (d) Voting will be by a show of hands; and
- (e) Resolutions will be passed if they are agreed to by a majority of those Wirangu Persons present and voting.

6. The resolution authorising me and the other persons authorised to be an applicant, was passed unanimously at a properly notified and attended meeting on 2 August 2019.

[64] The information provided by the applicant on 28 February 2020 includes a letter dated 9 September 2019 to the CEO of SANTS which includes the following relevant information:

- The Wirangu No 2 claim was prepared in 1998 and research has been carried out in order to achieve a consent determination in the area.²² This includes a description of the claim group which was informed in part by anthropological research.²³ The current application was made to rectify issues with the description of the Wirangu No 2 claim area.²⁴
- Authorisation meetings were held in Port Lincoln on 24 August 2018 and 2 August 2019.²⁵
- Purpose of the meeting on 24 August 2018 was to, among other things, file a new claim over parcels which became crown land since the Wirangu No 2 application was filed.²⁶
- On 3 August 2018, letters were mailed to approximately 120 members of the Wirangu Community whose addresses were maintained in the records of SANTS giving notice of the date, time, location and purpose of the meeting on 24 August.²⁷ On 8 July 2019, similar letters were sent to Wirangu people giving notice of the meeting on 2 August 2019.

²¹ *Harrington-Smith (No 9)*; see also *Evans* at [7].

²² Letter to CEO of SANTS dated 9 September 2019 at [5] – [6].

²³ At [8].

²⁴ At [9].

²⁵ At [12].

²⁶ At [13].

²⁷ At [13].

- The meetings were notified in the Port Lincoln Times, West Coast Sentinel and the Advertiser.²⁸ The notices invited all Wirangu claimants in the Wirangu No 2 claim group and gave a description of the group,²⁹ and advised of the date, time, location, and purpose including authorising a new claim over land parcels not included in the Wirangu No 2 application, of the meetings. The notices also invited members to register their interest and noted limited assistance would be provided including accommodation and transport.
- The meeting on 24 August 2018 was attended by 24 Wirangu people and the meeting on 2 August 2019 was attended by 31 Wirangu people.³⁰ Generally, the Wirangu have active channels of communication with each other and meetings are attended by Wirangu community members of standing who are seen as important attendees.³¹ Family members attend in a manner that is representative of family members who cannot attend. The meetings were also attended by elders or senior people, who are people of standing within each of their families and are, where appropriate, deferred to in relation to decisions of this kind.³²

24 August 2018 meeting

- A detailed agenda was handed out, and a PowerPoint presentation was provided.³³
- SANTS staff attended the meeting and recorded resolutions passed, which were all passed unanimously, including:
 - Resolution 1: sufficient notice was given of the meeting and those in attendance are representative of the apical ancestors, already included and the proposed additional ancestors, to authorise a new claim;
 - Resolution 2: the agreed to and adopted process referred to in the s 62 affidavits mentioned above;
 - Resolutions 3 to 6, 8, 10 and 12: amendment of the Wirangu No 2 claim group description which would be used for the proposed Wirangu No 3 claim and authorise the applicant to file the Wirangu No 3 claim.

2 August 2019 meeting

- Notice of the meeting was also sent to 18 Aboriginal organisations in South Australia.³⁴
- That part of the meeting considering the filing of the Wirangu No 3 application was attended by Wirangu claimants only.³⁵
- A presentation regarding the contents of the application was provided.³⁶

²⁸ At [13].

²⁹ The 2 August 2019 meeting notice also invited members of the Nauo No 3 claim for the first part of the meeting to allow both groups to consider resolving the overlap.

³⁰ At [17].

³¹ At [18].

³² At [19].

³³ At [13].

³⁴ At [13].

³⁵ At [13].

³⁶ At [13].

- SANTS attended the meeting and recorded the resolutions passed including:
 - Resolution 1: sufficient notice was given of the meeting, those who were unable to attend are represented by members of their families present, and there was sufficient representatives of the families who comprise the Wirangu people to enable authoritative decisions to be made by the meeting about the matters on the agenda;
 - Resolution 2: the agreed to and adopted the process used at the 24 August 2018 meeting.

Have the requirements of s 190C(4)(b) been met?

[65] I note that the first limb of s 190C(4)(b) requires that all the persons comprising the applicant must be members of the native title claim group.

[66] In each of their affidavits, the persons who jointly comprise the applicant depose that they are members of the native title claim group. I have not been provided with any material that contradicts those statements and information. It follows that I am satisfied that the persons who comprise the applicant are all members of the native title claim group.

[67] In respect of the second limb of s 190C(4)(b), namely that the persons who jointly comprise the applicant are authorised by all the other members of the claim group to make the application and to deal with matters arising in relation to it, the decision making process utilised at the authorisation meeting must be identified.³⁷

[68] Section 251B identifies two distinct decision making processes, namely a process that is mandated by traditional laws and customs and one that has been agreed to and adopted by the native title claim group. The affidavits of the persons comprising the applicant and the information accompanying the letter to the CEO of SANTS indicate that the claim group does not have a decision making process that is traditionally mandated and therefore an agreed and adopted process was used during the authorisation meetings. Given this information, I have considered the applicant's material in light of the requirements of s 251B(b).

[69] In particular, I understand that the 'effect of the section is to give the word "all" [in s 190C(4)(b)] a more limited meaning than it might otherwise have' and that it 'is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process'.³⁸

[70] In relation to notice of the authorisation meetings, I note that in *Weribone*, Rares J held that '[t]he notice must be sufficient to enable the persons to whom it is addressed ... to judge for themselves whether to attend the meeting and vote for or against a proposal' and that 'fair notice of the business to be dealt with at the meeting' must be given.³⁹ Justice Reeves noted that 'it is necessary that all members be offered a reasonable opportunity to decide whether to attend'.⁴⁰ The information before me shows that the claimants were informed of the meeting, including the date, time, place and purpose of each meeting. I am satisfied that fair notice of the business of each meeting was given and therefore a reasonable opportunity to

³⁷ *Doepel* at [78]; *Wiri People* at [21], [29] and [35].

³⁸ *Lawson* at [25].

³⁹ At [40] and [41].

⁴⁰ At [31].

participate was provided. I am therefore satisfied the authorisation meetings were properly notified.

- [71] I also understand that the following questions are required to be addressed about the authorisation process, although it is not required they be answered in any formal way as long as the substance of these questions are addressed:

Who convened it and why was it convened? To whom was notice given and why was it given? What was the agenda for the meeting? Who attended the meeting? What was the authority of those who attended? Who chaired the meeting or otherwise controlled the proceedings of the meeting? By what right did that person have control of the meeting? Was there a list of attendees compiled, and if so by whom and when? Was the list verified by a second person? What resolutions were passed or decisions made? Were they unanimous, and if not, what was the voting for and against a particular resolution? Were there any apologies recorded?⁴¹

- [72] In my view, the substance of those questions has been addressed in the material provided. The information reveals the reasons for the authorisation meetings. As mentioned above, the material indicates that all reasonable steps were taken to advise members of the native title claim group of the authorisation meetings, which included by public notice and letters, and the notices indicate that the claim group members were advised of the date, time, place and purpose of each meeting. The information also shows that the persons who were present at the meeting were given a reasonable opportunity to participate in the decision making process. In my view, the conduct of the meeting is such that those present agreed to use the adopted decision making process, and the actual process is indicative that it was inclusive allowing those present an opportunity to participate and have their votes counted. For instance, the claim group members who were present were able to participate through discussion and vote by a show of hands. The facts indicate that the persons who attended the meeting were sufficiently representative of their families or descent groups to make decisions on behalf of the claim group. The resolutions were passed, including the authorisation of the persons comprising the current applicant to make the application and to deal with matters arising in relation to it.

Decision

- [73] I am satisfied that the condition of s 190C(4)(b) is met.

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

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

- [74] For the reasons set out below, the application satisfies the condition of s 190B(2).

What is needed to meet this condition?

- [75] For the purposes of s 190B(2), I must be satisfied that the information and map contained in the application 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.

⁴¹ *Ward* at [24], cited in *Lawson* at [26].

What information has been provided about the boundaries of the application area?

[76] Schedule B describes the application area as comprising the parcels listed in a table. The listed parcels are identified by hundred name, DCDB ID and title. Schedule B also lists general exclusions and specifically excludes any land subject to the Wirangu No 2 application.

[77] Attachment C is a number of maps, including one overview of the application area and 17 enlargement maps, prepared by the Tribunal's geospatial services, titled 'SAD228/2019 Wirangu No. 3 SC2019/002' and dated 24 February 2020. The maps show the application area parcel boundaries depicted by a bold blue outline and identified by DCDB ID, road reserves and other parcel boundaries, topographic and aerial imagery, scalebar, legend, location diagram, coordinates, and notes relating to the source and datum of data used to prepare the maps.

Decision

[78] The geospatial assessment states that the application area has been amended and reduced and does not include any areas that have not previously been claimed. The assessment concludes that, while referring to some inconsistency in references to exclusions, the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[79] In light of the above information, I am satisfied that the description and the map of the application area, as required by ss 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

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

[80] For the reasons set out below, the application satisfies the condition of s 190B(3).

What is needed to meet this condition?

[81] I must be satisfied that either the persons in the native title claim group are named in the application (s 190B(3)(a)) or described sufficiently clearly so that it can be ascertained whether any particular person is in that group (s 190B(3)(b)).

[82] When assessing the requirements of this provision, I understand that:

- I am required to address only the content of the application;⁴²
- section 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification';⁴³
- where a claim group description contains a number of paragraphs, the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open';⁴⁴

⁴² *Doepel* at [51] and *Gudjala 2007* at [30].

⁴³ *Gudjala 2007* at [33].

⁴⁴ *Gudjala 2007* at [34].

- to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group, '[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described'.⁴⁵

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

- [83] Schedule A describes the native title claim group as all the descendants of a list of apical ancestors including those who have been adopted by them and their descendants in accordance with Wirangu traditional law and custom.
- [84] It follows from the description that the condition of s 190B(3)(b) is applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.
- [85] I note that the Court has accepted the approach of identifying members of the native title claim group by biological descendants, including by adoption, of named people.⁴⁶
- [86] I consider that requiring a member to show descent from an identified ancestor provides a clear starting or external reference point to commence an inquiry about whether a person is a member of the native title claim group.
- [87] I am of the view that with some factual inquiry it will be possible to identify the persons who are members of the native title claim group.
- [88] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s 190B(3)(b).
- [89] The application satisfies the condition of s 190B(3).

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

- [90] For the reasons set out below, the application satisfies the condition of s 190B(4).

What is needed to meet this condition?

- [91] The task at s 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning.⁴⁷
- [92] The description referred to in s 190B(4), and as required by s 62(2)(d) is 'a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law'.

⁴⁵ *WA v NTR* at [67].

⁴⁶ See *WA v NTR* at [67].

⁴⁷ *Doepel* at [91], [92], [95], [98] to [101] and [123].

- [93] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s 223, when considering the claim under s 190B(6) of the Act. For the purposes of s 190B(4), I will focus only on whether the rights and interests as claimed are 'readily identifiable'. While undertaking this task, I consider that a description of a native title right and interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)'.⁴⁸
- [94] I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself.⁴⁹

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

- [95] Schedule E contains a description of the claimed native title rights and interests. I am satisfied that it is understandable and has meaning.
- [96] I have considered the description of the native title rights and interests claimed and find that each right and interest is sufficient to fall within the scope of s 223 and is readily identifiable as a native title right and interest.

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

- [97] 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?

- [98] While assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the native title rights and interests that have been identified.⁵⁰
- [99] Although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimants' factual basis material.⁵¹
- [100] I also understand that the applicant's material must be 'more than assertions at a high level of generality' and must not merely restate or be an alternate way of expressing the claim.⁵²
- [101] I am therefore of the opinion that the test at s 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions, before the Registrar can be satisfied of its sufficiency for the purpose of s 190B(5).
- [102] The factual basis material is contained in Attachment F and the additional material provided by the applicant, including the applicant's submissions in relation to the occupation evidence

⁴⁸ *Strickland* at [60]; see also *Strickland FC* at [80] to [87], where the Full Court cited the observations of French J in *Strickland* with approval.

⁴⁹ *Doepel* at [16].

⁵⁰ *Doepel* at [17] and *Gudjala FC* at [57], [83] and [91].

⁵¹ *Gudjala FC* at [92].

⁵² *Gudjala 2009* at [28] and [29] and *Anderson* at [43] and [48].

in support of Wirangu reliance on s 47B (submissions), and expert report dated 27 May 2019 (expert report).

[103] I proceed with my assessment of the sufficiency of this material by addressing each assertion set out in s 190B(5) below. I note that the above material is extensive and I will therefore discuss only those aspects that in my view are most relevant to my consideration without referring to all the relevant information.

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

[104] I understand that s 190B(5)(a) requires sufficient factual material to support the assertion:

- that there is ‘an association between the whole group and the area’, although not ‘all members must have such association at all times’;⁵³
- that the predecessors of the group were associated with the area over the period since sovereignty,⁵⁴ and
- that there is an association with the entire claim area, rather than an association with part of it or ‘very broad statements’, which for instance have no ‘geographical particularity’.⁵⁵

What information has been provided in support of the assertion at s 190B(5)(a)?

[105] The factual basis contains the following relevant information about the association of members of the native title claim group, and that of their predecessors, with the application area:

- The application area consists of parcels of land located in the Eyre Peninsula, generally around Streaky Bar and Corvisart Bay in the north/northwest; Sceale Bay, Searcy Bay and Baird Bay in the west/mid-west; Venus Bay and Anxious Bay in the south/southwest; and around Karcultaby in the east/mid-east. I have referred to the parcels by reference to where they are located in the first map in Attachment C.
- Effective sovereignty in the area occurred in the late 1840s.⁵⁶
- Historical sources suggest Aboriginal occupation of the region since the early 19th century, including the parcels near the southern region.⁵⁷
- Of relevance to the association of some of the apical ancestors identified in Schedule A and their descendants, the factual basis includes the following information:
 - Anthropological research records apical ancestor Binilya as a Wirangu woman born in 1855, and therefore her parents are likely to have been associated with the application area before effective sovereignty.⁵⁸ Her ‘run’ appears to have included a place proximate to parcels in the northwest, indicating she had rights to country

⁵³ *Gudjala 2007* at [52].

⁵⁴ *Gudjala 2007* at [52].

⁵⁵ *Martin* at [26]; see also *Corunna* at [39] and [45].

⁵⁶ Expert report at [20].

⁵⁷ At [51] – [52] and [71].

⁵⁸ At [328] – [329] and [332].

there. Fieldwork indicates that the family of Binilya and Kaltyna's son were also at these locations. Their descendants have rights to all of Wirangu land.⁵⁹

- Apical ancestor Eliza Ellen was born around 1840 in the area where the parcels in the northwestern region are located.⁶⁰ Her parents were, or at least her mother was, therefore associated with the area prior to sovereignty, which occurred in 1825.⁶¹ Eliza Ellen had two daughters and a son, being apical ancestor Bob Ware.⁶² He was born about 1860 where his mother was also born, and he married apical ancestor Lucy Minjia.⁶³ Lucy Minjia was born in 1872 in the area near where the parcels in the northwest are located and died in 1951.⁶⁴ Her siblings were apical ancestors Wilubi and Tjeira.⁶⁵ Their mother, and therefore Lucy, was connected to country that included the parcels in the northwest.⁶⁶ Current descendants of Eliza Ellen continue to be connected to Wirangu country.⁶⁷ In particular, descendants of Bob Ware and Lucy Minjia possess rights to country in the northern to mid-western region and spend much of their time there, such as fishing at a nearby bay where parcels in the mid-west are located.⁶⁸ The great grandson of Bob Ware and Lucy Minjia lived at a location near the parcels in the eastern region.⁶⁹ While living there, he and his family would travel to the coast to fish, hunt and gather bush foods. They would travel through the country hunting, gathering water and camping along the way. They would camp all along the coast, travelling to where the fish were biting.⁷⁰ He and his wife now bring their grandchildren showing them how to fish and live off the land, whether at the coast or inland. He says that he and his wife would stay at an old farm house in the northern region, adjacent to land parcels within the application area, where other Wirangu people lived and worked.⁷¹ He says that a Dreaming story is told at a place in the mid-western region.⁷²
- Tjeira was born around 1860 and, as her sister ancestor Lucy Minjia, had rights to country, or could at least access and use country, that included the parcels of land in the northwest.⁷³ Her daughter was born in 1875 and was married to a man 'recognised as a leader of those [Aboriginal camp dwellers]' in the area where the parcels in the northwest are located.⁷⁴ The great great granddaughter of Tjeira speaks of her family connection to and ongoing use of resources located in areas around the

⁵⁹ At [331].

⁶⁰ At [336].

⁶¹ At [18] and [336] – [337].

⁶² At [338] – [341].

⁶³ At [339].

⁶⁴ At [375].

⁶⁵ At [376].

⁶⁶ At [378].

⁶⁷ At [342] – [343].

⁶⁸ At [382] – [385].

⁶⁹ Submissions at [29].

⁷⁰ At [31].

⁷¹ At [39] – [40].

⁷² At [41].

⁷³ Expert report at [413] and [416].

⁷⁴ At [420] – [421].

parcels in the mid-western region.⁷⁵ She says that she travelled through the areas around where the parcels in the eastern region is located, and then west to the parcels in the western region, with her parents and grandfather and she now visits these places with her children, grandchildren and/or other members of her family.⁷⁶ They would harvest food such as *galdas* and quandongs.⁷⁷ The claimant tells family stories that describe the resources her grandmother took from the foreshores and coastal areas and how she and her children and grandchildren continue those traditional activities, including camping, fishing and collecting razorfish and other shellfish.⁷⁸ Another descendant of Lucy Minjia speaks of learning to harvest and also teaching her children those skills, around coastal areas such as near where the parcels in the mid-west and south are located.⁷⁹

- Wilubi was born in 1865 and would also have rights to areas around where the parcels in the northwestern region are located through his mother Eliza Ellen.⁸⁰ His son was also born in this area in 1904.⁸¹
- Apical ancestor Annie Wombat was born around 1895 to early 1900s and was married to Jack Wombat.⁸² She spent considerable time in the area where the parcels in the north to the south are located.⁸³ She died in 1964, proximate to the parcels in the northern region.⁸⁴ Both apical ancestors and their family group were often recorded as camping and foraging within Wirangu country from the late 19th century and during the 20th century.⁸⁵
- Yaldildi Johnny Gibera was born around 1860 in the area around where parcels in the northwestern region are located.⁸⁶ Historical records indicate he was from an area that was proximate to the parcels in the eastern region. His descendants are likely to be linked to these areas.⁸⁷
- The members of the claim group have carried out traditional activities such as camping, hunting, fishing, gathering resources, and protecting sites, and have learnt traditional knowledge from their elders such as parents, grandparents and extended family, which they have also taught their children and grandchildren.⁸⁸ These activities are typical of how they and their predecessors occupied and used the entire claim area.

⁷⁵ Submissions at [16]

⁷⁶ At [17].

⁷⁷ At [17].

⁷⁸ At [18] – [20].

⁷⁹ At [46].

⁸⁰ Expert report at [424] and [426].

⁸¹ At [426].

⁸² At [361].

⁸³ At Table 3

⁸⁴ At [361].

⁸⁵ At [366].

⁸⁶ At [428].

⁸⁷ At [432]

⁸⁸ Schedule F and Submissions at [14].

- Rights in Wirangu country have been transmitted through descent in accordance with customary principles.⁸⁹ In particular, the right to exercise native title interests on country is based on patrilineation or matrilineation to a Wirangu ancestor with rights reinforced by birth place, spiritual conception place and rights through marriage.⁹⁰ The claimants stay in the residential locations within and near the claim area such as near the northern and western regions.⁹¹

Is the factual basis sufficient to support the assertion at s 190B(5)(a)?

[106] For the purposes of this condition, I understand that the Registrar is required ‘to address the relationship which all members claim to have in common in connection with the relevant land’⁹². In my view, this criterion relates to the ‘alleged facts [supporting] the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)’.⁹³ I consider that these principles are relevant in assessing the sufficiency of the claimant’s factual basis for the purpose of the assertion at s 190B(5)(a) as they elicit the need for the factual basis material to provide information pertaining to the identity of the native title claim group, the predecessors of the group and the nature of the association with the area covered by the application. In that regard, I consider that the factual basis material clearly identifies the native title claim group and acknowledges the relationship the native title claim group have with their country, which is both of a physical and spiritual nature. The factual basis reflects the knowledge claim group members have of their traditional land and waters including locations to fish and gather traditional food and where Dreaming stories are told.

[107] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area.⁹⁴ The factual basis indicates that sovereignty in the area occurred in 1825 but effective sovereignty occurred in the late 1840s. Aboriginal people were recorded to be present in the region since the early 19th century and apical ancestor Eliza Ellen was born around 1840 before effective sovereignty. Her daughter was born in 1872 within or near the northern parcels of the application area. Their descendants, which includes the descendants of Eliza Ellen’s other children, being ancestor Tjeira and Wilubi, either were born, visited, hunted, fished, gathered resources or camped on the parcels that comprise the application area.

[108] For the purposes of s 190B(5)(a), I must also be satisfied that there is sufficient factual material to support the assertion of an association between the group and the whole area. The asserted facts indicate that Aboriginal people were observed before or just after sovereignty near the southern parcels. Apical ancestors Binilya, Eliza Ellen, Bob Ware, Lucy Minjia, Tjeira, Wilubi and Yaldildi Johnny Gibera either were born, lived on or otherwise associated with land parcels within the northern region. Yaldildi Johnny Gibera was also said to be from an area near the parcels around the eastern region. Annie Wombat spent considerable time around where the parcels in the north to the south are located. She died

⁸⁹ Expert report at [433] – [434].

⁹⁰ At [435].

⁹¹ Schedule F.

⁹² *Gudjala 2007* at [40].

⁹³ At [39].

⁹⁴ At [51].

near the northern region. Many of the descendants were born, lived or have travelled, fished, hunted or camped on or around the parcels in the northern, western, southern or eastern regions. The claimants also speak of a Dreaming story being told at a location in the western region.

[109] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, both physical and spiritual, ‘between the whole group and the area’.⁹⁵ In my view, the factual basis material provides sufficient examples and facts of the necessary geographical particularity to support the assertion of an association between the whole group and the whole area.

Decision

[110] Given the information before me, I am satisfied that the factual basis provided is sufficient to support the assertion described by s 190B(5)(a).

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

[111] The definition of ‘native title rights and interests’ in s 223(1)(a) provides that those rights and interests must be ‘possessed under the traditional laws acknowledged, and traditional customs observed,’ by the native title holders. Noting the similar wording between this provision and the assertion at s 190B(5)(b), I consider that it is appropriate to apply s 190B(5)(b) in light of the case law regarding the definition of ‘native title rights and interests’ in s 223(1). In that regard, I have taken into consideration the observations of the High Court in *Yorta Yorta* about the meaning of the word ‘traditional’.⁹⁶

[112] In light of *Yorta Yorta*, I consider that a law or custom is ‘traditional’ where:

- ‘the origins of the content of the law or custom concerned are to be found in the normative rules’ of a society that existed prior to sovereignty, where the society consists of a body of persons united in and by its acknowledgement and observance of a body of law and customs;⁹⁷
- the ‘normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty’;⁹⁸
- the law or custom has been passed from generation to generation of a society, but not merely by word of mouth;⁹⁹
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty, having been passed down the generations to the claim group.¹⁰⁰

[113] I note that in *Gudjala 2009*, Dowsett J also discussed some of the factors that may guide the Registrar, or her delegate, in assessing the asserted factual basis, including:

⁹⁵ See *Gudjala 2007* at [52].

⁹⁶ See *Gudjala 2007* at [26] and [62] to [66].

⁹⁷ At [46] and [49].

⁹⁸ At [47].

⁹⁹ At [46] and [79].

¹⁰⁰ At [87].

- that the factual basis demonstrates the existence of a pre-sovereignty society and identifies the persons who acknowledged and observed the laws and customs of the pre-sovereignty society;¹⁰¹
- that if descent from named ancestors is the basis of membership to the group, the factual basis demonstrates some relationship between those ancestral persons and the pre-sovereignty society from which the laws and customs are derived;¹⁰² and
- that the factual basis contains an explanation as to how the current laws and customs of the claim group are traditional (that is laws and customs of a pre-sovereignty society relating to rights and interests in land and waters). Further, the mere assertion that current laws and customs of a native title claim group are traditional because they derive from a pre-sovereignty society from which the claim group is said to be descended, is not a sufficient factual basis for the purposes of s 190B(5)(b).¹⁰³

[114] In *Warrie*, the Full Federal Court observed that while ‘a claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character’, the Act did not ‘require establishment of some overarching “society” that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title’.¹⁰⁴

What information has been provided in relation to the society?

[115] The identification of a pre-sovereignty society or a society that existed prior to effective sovereignty of the application area is relevant to my assessment of the assertion at s 190B(5)(b). In particular, I am of the view that identification of such a society is necessary to support the assertion of a connection between that society and the apical ancestors as well as a connection with the current native title claim group. I consider the following asserted facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society:

- The Wirangu, Nauo and Barngarla people shared laws and customs and had similar languages.¹⁰⁵ The groups, possibly with others, formed a culture bloc due to their similar spiritual and religious beliefs, subsistence practices and material culture.¹⁰⁶ In particular, a moiety system was followed and social and territorial clans performed roles in the region, which demonstrate the existence of an organised society.¹⁰⁷
- Members of this society observed a cultural and social system featuring laws and customs associated with spiritual beliefs, beliefs in supernatural beings, organisation of people with the landscape and between themselves, and access to land and resources.¹⁰⁸ These laws and customs regulated resource use, entry into country, trade, particular subsistence practices and techniques, increase of natural species, use of resources, initiation and

¹⁰¹ At [37] and [52].

¹⁰² At [40].

¹⁰³ At [29], [54] and [69].

¹⁰⁴ *Warrie* at [107]; see also *Alyawarr* at [78].

¹⁰⁵ Expert report at [91] and [210].

¹⁰⁶ At [100].

¹⁰⁷ At [93] – [94] and [98].

¹⁰⁸ At [209].

regulation of spiritual and religious entities associated with the land and human social and economic behaviour.¹⁰⁹

- A defining feature of the society present at effective sovereignty included rituals associated with death, burial, spirits of the deceased and other spiritual beliefs.¹¹⁰ Such a system included knowledge of mythical beings that influenced human behaviour, the performance of ceremony, customs associated with spirits, and belief in malevolent spirits that affect human behaviours.¹¹¹
- Defining features of the economic system at or before effective sovereignty included exploitation of resources for food, medicine, and construction of material items such as throwing sticks, spears and fish traps; use of resource exploitation techniques to extract resources; and trade of resources internally along well-established trading routes.¹¹² The use of resources demonstrates a degree of ownership of these resources which would have been regulated by laws and customs governing unauthorised entry and inappropriate resource use.¹¹³
- The neighbouring groups had particular attachment to a territorial area and had a system of classifying landscape and particular places located in it through their religious and spiritual belief that ancestral beings and spirits not only created features of the physical world but also the social and economic behaviour of Wirangu people and neighbours who share these beliefs.¹¹⁴
- The Wirangu, and neighbouring groups, were socially organised into named moieties which acted to systematise kinship arrangements and provide division for social and ceremonial purposes.¹¹⁵ The moiety system was associated with a clan system of social (matrilineal) and territorial (patrilineal) clans. The former resulted in a special relationship between individuals and the latter focussed on a strong spiritual connection with country and localities.

What information has been provided in relation to the traditional laws and customs?

[116] The factual basis contains the following relevant information about the traditional laws and customs of the native title claim group.

[117] The current claimants maintain customary beliefs associated with spiritual attachments to land including the presence of malevolent spirits such as those that attack at night, belief that a bird species can predict unfortunate events such as deaths, presence of deceased ancestors on land, and the mytho-religious creation beings responsible for the landscape and customary behaviour such as women avoiding looking at particular mythological sites associated with men's business.¹¹⁶ The claimants perform rituals to ward off negative bird omens, maintain gender restricted knowledge and behaviour, avoiding inappropriate places such as burial and

¹⁰⁹ At [208].

¹¹⁰ At [120].

¹¹¹ At [120].

¹¹² At [122] – [141].

¹¹³ At [141].

¹¹⁴ At [159], [161] and [163].

¹¹⁵ At [164].

¹¹⁶ At [218] – [253].

massacre sites, passing on knowledge of spiritual places and entities to other claimants, protecting important places, and informing strangers about important and dangerous places through signposts and memorials.¹¹⁷

- [118] The claimants observe a land tenure system, based on the original system involving smaller group estates, where claimants who have a Wirangu parent inherit a potential to exercise native title rights and interests in the whole of Wirangu country.¹¹⁸ The current system shares the same features with the original system, namely descent being a primary element of group recruitment with contextual factors such as birth, residence, death/burial also influencing the choice made, and spiritual links to Wirangu land through beliefs in the spirits of the deceased, malevolent spirits, bird prophecy and mythological beings.¹¹⁹ Spiritual beliefs continue to influence Wirangu perceptions of the location and ownership of Wirangu land and its economic exploitation.¹²⁰
- [119] The current system of Wirangu resource utilisation, while adapted, continues the basic features of the original system, including laws and customs associated with links to land and a right to exclude or permit others from being on Wirangu land and using its resources.¹²¹ Current laws and customs associated with resource use include the avoidance of inappropriate spiritual places, the preparation and distribution of harvested species and a need to gain permission to use resources by outsiders.¹²² For instance, current claimants continue to fish and hunt for lizards, rabbits, kangaroos and emus.¹²³ They take resources from the land for bush food such as wild peach and mallee leaves, to make artefacts such as boomerangs and didgeridoos, and also to harvest bush medicine.¹²⁴ The Wirangu people also know the traditional techniques how to hunt, fish, and collect bush resources as well as have knowledge of the rules associated with cooking.¹²⁵
- [120] Current Wirangu laws and customs associated with kinship and classification are developed from, and still reflect, pre-contact practices, such as the use of kin terms, nicknames for claimants and their ancestors, and a focus on bloodlines and descent.¹²⁶
- [121] The asserted facts indicate that the laws and customs continue to exist and, based on accounts from claimants of the stories told to them by the 'old people', they were in place since effective sovereignty although with some change due to historical factors.¹²⁷
- [122] I note that the information extracted at s 190B(5)(a) is also relevant to my consideration of the assertions at s 190B(5)(b).

¹¹⁷ At [254].

¹¹⁸ At [285] – [286].

¹¹⁹ At [287].

¹²⁰ At [257].

¹²¹ At [316].

¹²² At [317].

¹²³ At [451] – [455].

¹²⁴ At [456] – [458].

¹²⁵ At [292] – [293].

¹²⁶ At [258] – [263].

¹²⁷ At [255] – [256].

Is the factual basis sufficient for the assertion of s 190B(5)(b)?

- [123] My understanding of the factual basis material is that the pre-sovereignty society encompassed a wide area of land, which is held at a localised level by various groups, including the native title claim group. Members of the society shared laws and customs, had similar languages, and formed a culture bloc due to their similar spiritual and religious beliefs, subsistence practices and material culture. A feature of the society involved rituals associated with death, burial and spirits of the deceased and other spiritual beliefs, including knowledge of mythical beings. Members of the society also exploited resources for food, medicine and construction of items, practiced various resource exploitation techniques, and conducted trade. They also observed social organisation, including kinship arrangements.
- [124] In my view, the factual basis indicates that the application area is situated within this society and their traditional laws and customs are said to be derived from it. In my view, within this society, the rights and interests in land that are asserted to be held by the members of the native title claim group are based on regionally held and practiced laws and customs. Relevant to this proposition, the Courts have said that '[i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, *without that wider population being a part of the claim group*'.¹²⁸
- [125] The factual basis reveals that the laws and customs currently observed and acknowledged by the claim group are based on a form of social organisation involving kinship and classification, land tenure system, spiritual observance and observance of laws relating to traditional usage of the resources of their land and waters. The content of the traditional laws and customs is said to have been passed down to the current members of the native title claim group through the preceding generations.
- [126] In my view, the factual basis demonstrates that the ancestors were living on, or were among the generation born to those who were living on, the application area at the time of effective sovereignty. In this sense, I understand that the information supports the assertion that the apical ancestors were born into the claim group of the society that existed at and prior to effective sovereignty.¹²⁹ From the factual basis, I understand the current claim members are the descendants of these ancestors.¹³⁰
- [127] I am of the view that there is information contained within the factual basis material from which the current laws and customs can be compared with those that are asserted to have existed at effective sovereignty. The claim group members continue to follow a system of kinship and classification which involves use of kin terms, nicknames and focus on bloodlines and descent.
- [128] The native title claim group observe a landholding system where rights and interests to land are based on descent with birth, residence, and death/burial being influencing factors. The claimants continue to protect country and its resources through excluding or permitting outsiders from being on their land and using its resources.

¹²⁸ *Harrington-Smith (No 5)* at [53], emphasis added.

¹²⁹ See *Gudjala 2009* at [55] and also my reasons at s 190B(5)(a) above.

¹³⁰ Schedule A and Expert report at [276].

- [129] The factual basis contains some information which speaks to the way the members of the claim group continue to perform traditional practices such as camping, hunting, gathering resources for bush medicine or to make traditional items like boomerangs and still use traditional techniques. This in my view demonstrates that the laws and customs currently observed are relatively unchanged from those acknowledged and observed by their predecessors, and that they have been passed down the generations to the claimants today.
- [130] The factual basis also contains references to current observance and acknowledgement of laws and customs of a spiritual nature. The claimants have a spiritual relationship to country and continue to have knowledge of creation beings and malevolent spirits and the related stories, beliefs or sites.
- [131] The factual basis, in my view, is sufficient to support the assertion that the relevant laws and customs, acknowledged and observed by this society, have been passed down through the generations, by oral transmission and practical instruction, to the current members of the claim group, and have been acknowledged by them without substantial interruption. The asserted facts state, for instance, that claimants have knowledge of creation beings, other spiritual beings, spiritual and avoidance sites, hunting and fishing techniques, cooking practices and bush medicine. I infer that, given the level of detail in the continued acknowledgement and observance of the group's cultural traditions, that the laws and customs have been passed between a few generations from the apical ancestors to the current claimants and the fact ancestor Lucy Minjia taught harvesting skills to her children, the apical ancestors would have also practiced these modes of teachings. It follows, in my view, that the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as they derive from a society that existed at the time of effective sovereignty.

Decision

- [132] I am satisfied that the factual basis provided is sufficient to support the assertion described by s 190B(5)(b).

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

- [133] This condition is concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed in accordance with their traditional laws and customs.
- [134] Meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.¹³¹ In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.
- [135] I also understand that if the claimant's factual basis relied upon the drawing of inferences, that '[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'.¹³²

¹³¹ *Martin* at [29].

¹³² *Gudjala 2009* at [33].

Is the factual basis sufficient for the assertion of s 190B(5)(c)?

[136] There is, in my view, information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs.

[137] The factual basis indicates that the native title claim group learn from their predecessors, such as their parents and grandparents, about the laws and customs.¹³³ For instance, they learn stories and customary behaviours about mytho-religious creation spirits, malevolent spirits and sites of avoidance.¹³⁴ The claimants also speak of the importance of keeping Wirangu country safe by visiting it and talking for it.¹³⁵ The Wirangu people also learn how to hunt, fish, collect bush resources, and make traditional artefacts, as well as the rules associated with cooking and pass this knowledge to the younger generation.¹³⁶

[138] In reaching my view in relation to this requirement, I have also considered my reasons in relation to s 190B(5)(b) and in particular that:

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of the native title claim group in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

Decision

[139] I am satisfied that the factual basis provided is sufficient to support the assertion described by s 190B(5)(c).

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

[140] As set out below, 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).

What is needed to meet this condition?

[141] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be prima facie established. Thus, 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'.¹³⁷ Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed'.¹³⁸

¹³³ Expert report at [219].

¹³⁴ At [219] and [241].

¹³⁵ At [232].

¹³⁶ At [292] – [293].

¹³⁷ *Doepel* at [135].

¹³⁸ *Doepel* at [126], [127] and [132].

[142] I note that this section is one that permits consideration of material that is beyond the parameters of the application.¹³⁹

[143] I understand that the requirements of s 190B(6) are to be considered in light of the definition of ‘native title rights and interests’ at s 223(1).¹⁴⁰ I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional laws and customs in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[144] I also understand that a claimed native title right or interest can be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.¹⁴¹

[145] I note that the ‘critical threshold question’ for recognition of a native title right or interest under the Act ‘is whether it is a right or interest “in relation to” land or waters’.¹⁴² I also note that the phrase ‘in relation to’ is ‘of wide import’.¹⁴³ Having examined the native title rights and interests set out in Schedule E of the application they are except the right at paragraph (b)(h) as discussed below, prima facie, rights or interests ‘in relation to land or waters.’

[146] I also note that I consider that Schedule B of the application sufficiently addresses any issue of extinguishment, for the purpose of the test at s 190B(6).

[147] Before I consider the rights and interests claimed, I note that my reasons at s 190B(6) should be considered in conjunction with, and in addition to, my reasons and the material outlined at s 190B(5).

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

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

[148] The majority of the High Court in *Ward HC* considered that ‘[t]he expression “possession, occupation, use and enjoyment ... to the exclusion of all others” is a composite expression directed to describing a particular measure of *control over access to land*’.¹⁴⁴ The High Court further noted that the expression, collectively, conveys ‘the assertion of rights of control over

¹³⁹ *Doepel* at [16].

¹⁴⁰ *Gudjala 2007* at [85].

¹⁴¹ *Yorta Yorta* at [86] and *Gudjala 2007* at [86]

¹⁴² *Ward HC* per Kirby J at [577].

¹⁴³ *Alyawarr* at [93].

¹⁴⁴ At [93], emphasis added.

the land’, which necessarily flow ‘from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country’.¹⁴⁵

[149] In *Griffiths*, the Full Court, while exploring the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stated that:

the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. *It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom.*¹⁴⁶

[150] I also note the Full Court’s observations in relation to control of access to country that:

[i]f control of access to country flows from spiritual necessity because of the harm that “the country” will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a “spiritual affair”. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have ... an exclusive right of possession, use and occupation.¹⁴⁷

[151] In examining whether the claimants’ material prima facie establishes its existence, I am of the view that this right materialises from traditional laws and customs that permit the native title claim group to exhibit control over all others in relation to access to the land and waters.

[152] The factual basis refers to laws and customs regarding protocols for entry and sanctions for unauthorised entry to restricted areas.¹⁴⁸ In addition, there are references to Wirangu spiritual and religious beliefs in the presence of malevolent spirits resulting in the avoidance of places and that these beliefs are connected to customary laws and behaviours regulating entry to country.¹⁴⁹

[153] The anthropological material concludes that the Wirangu current system of laws and customs are derived from the pre-sovereignty society and include laws and customs associated with Wirangu spiritual and genealogical links to their land and a right to exclude or permit others from being on their land and using its resources.¹⁵⁰ The native title claim group believe that inappropriate spiritual places should be avoided and say that permission to use the resources on Wirangu country are required by outsiders.¹⁵¹ The claimants also believe that they must protect country by speaking for country.¹⁵²

¹⁴⁵ At [93].

¹⁴⁶ At [71], emphasis added.

¹⁴⁷ At [127].

¹⁴⁸ Expert report at [126].

¹⁴⁹ At [203] – [204].

¹⁵⁰ At [311] – [313] and [316].

¹⁵¹ At [317] and Table 5.

¹⁵² At [232] and Table 6.

[154] I am of the view that the factual basis material asserts that current members of the native title group maintain knowledge of their country. The knowledge of the laws and customs of the current members, as owners of their traditional land and waters, elicit that they have a 'spiritual affair' with their country and have the right to exclude other people from it. In my view, such control flows from a right to speak for country and a spiritual necessity to protect country from harm and injury and from country harming others. I understand this symbolic ownership encompasses the right to speak for country and the right to exclude.

[155] I consider that this right is prima facie established.

Over areas where a claim to exclusive possession cannot be recognised, the following non-exclusive rights and interests are claimed:

c. right of access to the area

e. the right to enjoy resources of the area

f. the right to trade in resources of the area for traditional purposes

[156] The factual basis indicates that the claimants continue to access their country to live, camp, fish and hunt for lizards, rabbits, kangaroos and emus.¹⁵³ They take resources from the land for food and medicine such as wild peach and mallee leaves, and to make artefacts such as boomerangs and didgeridoos.¹⁵⁴ Historical and anthropological records refer to trade routes and state that the predecessors traded bush food such as mallee fowl eggs for flour from non-Aboriginal people and traded resources and artefacts with other groups.¹⁵⁵ Current claimants continue to exercise this right to trade in resources to make a living from indigenous heritage.¹⁵⁶

[157] It is my view that the factual basis material prima facie establishes that these rights are possessed pursuant to the traditional laws and customs of the native title claim group.

g. the right to maintain and protect places of importance under traditional laws, customs and practices in the area

[158] The claimants speak of an obligation to protect sites of cultural importance located on Wirangu country, such as through cultural heritage clearance.¹⁵⁷ This customary right and obligation arises from their spiritual attachment to land through belief in creation beings, the spirits of ancestors, other spiritual beings and genealogical links to their ancestors.

[159] It is my view that the factual basis material prima facie establishes that this right is possessed under the traditional laws and customs of the native title claim group.

¹⁵³ At [451] – [455].

¹⁵⁴ At [456] – [458].

¹⁵⁵ At [128], [135] and [141].

¹⁵⁶ At [497].

¹⁵⁷ At [478] – [484].

Which rights cannot be prima facie established?

a. to possess, occupy, use and enjoy the area

b. the right to make decisions about the traditional use and enjoyment of the area

d. the right to control the access of others to the area for traditional purposes

[160] I consider that these rights can usually be claimed in relation to areas where exclusive native title rights and interests can be exercised. However, the court has shown a willingness to uphold non-exclusive rights that exert a degree of exclusivity and control in situations where those rights are qualified to be against persons who are bound by the laws and customs of the native title holders.¹⁵⁸

[161] The way these rights have been framed do not qualify them to be against other Aboriginal people bound by the traditional laws and customs of the group. I am therefore of the view that these rights are not prima facie established pursuant to the claim group's traditional laws and customs.

h. the right to maintain, protect and prevent the misuse of cultural knowledge associated with the area

[162] The Courts have held that the scope of this right goes beyond the content of the definition in s 223(1).¹⁵⁹ Accordingly, I am unable to consider this right to be prima facie established pursuant to the claim group's traditional laws and customs.

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

[163] For the reasons set out below, the application satisfies the condition of s 190B(7).

What is needed to meet this condition?

[164] This condition requires that I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done.

[165] The Courts have observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'.¹⁶⁰ In interpreting connection in the 'traditional' sense as required by s 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that 'the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs ... "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty'.¹⁶¹

¹⁵⁸ See for instance *De Rose* at [553] and *Mundraby* at [3(c)(ii)].

¹⁵⁹ See for instance *Ward HC* at [57] - [61] and *Ngarla* at [497].

¹⁶⁰ *Gudjala 2009* at [84].

¹⁶¹ At [86].

[166] I consider that for the purposes of s 190B(7), I must be satisfied of a particular fact or facts, from the material provided, that at least one member of the claim group has or had the necessary traditional *physical* association with the application area.¹⁶²

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

[167] I refer to the information above in relation to s 190B(5) of these reasons, which provide a sufficient factual basis supporting the assertion that the native title claim group acknowledges and observes the traditional laws and customs of the pre-sovereignty society.

[168] The factual basis contains relevant information that describe a traditional physical association of members of the claim group with the application area, including accessing country, visiting sites, camping, hunting, fishing and performing other practices within the application area.¹⁶³

[169] Given the above, and considering all of the information provided with the application, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with the land or waters within the application area.

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

[170] As set out in my reasons below, in my view the application does not offend any of the provisions of ss 61A(1), (2) and (3) and therefore the application satisfies the condition of s 190B(8).

[171] Section 190B(8) requires that 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.

[172] 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.

No native title determination application if approved determination of native title (s 61A(1))

[173] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The results of my own search of the Tribunal's mapping database confirm this. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

Claimant application not to be made covering previous exclusive possession over areas (s 61A(2))

[174] Schedule B states that any area in relation to which a previous exclusive possession act is done is excluded from the application.

Claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas (s 61A(3))

[175] I understand s 61A(4) specifically provides that s 61A(3) does not apply to an application in circumstances where the application states that ss 47, 47A or 47B applies to it.

¹⁶² *Doepel* at [18].

¹⁶³ See for instance Expert Report at [456] – [458].

[176] The application appears to indicate that native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others is not claimed in an area that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss 47, 47A and 47B of the Act may apply.¹⁶⁴

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

[177] The application satisfies the condition of s 190B(9), because it meets all three subconditions, as set out in the reasons below.

[178] Section 190B(9) provides that the application and accompanying documents must not disclose, and the Registrar must not be aware of the matters set out in subparagraphs (a) to (c).

No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown (s 190B(9)(a))

[179] Schedule Q provides that the applicant does not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown.

Exclusive possession is not claimed over all or part of waters in an offshore place (s 190B(9)(b))

[180] Schedule P provides that the applicant does not claim exclusive possession of any offshore place.

Native title rights and/or interests in the application area have otherwise been extinguished (s 190B(9)(c))

[181] Schedule B provides that the area covered by the application excludes land or waters where the native title rights and interests claimed have been otherwise extinguished.¹⁶⁵

[182] There is no other information before me to indicate, that the native title rights and interests claimed have otherwise been extinguished.

End of reasons

¹⁶⁴ See Schedules B and L.

¹⁶⁵ At [3].

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Wirangu No 3
NNTT No.	SC2019/002
Federal Court of Australia No.	SAD228/2019

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:

25 October 2019

Date application entered on Register:

20 March 2020

Applicant:

As appears on the extract from the Schedule of Native Title Applications

Applicant's address for service:

As appears on the extract from the Schedule of Native Title Applications

Area covered by application:

As appears on the extract from the Schedule of Native Title Applications, except rename Attachment B to Schedule B and remove reference to Schedules C and D on page 5

Persons claiming to hold native title:

As appears on the extract from the Schedule of Native Title Applications

Registered native title rights and interests:

As appears on the extract from the Schedule of Native Title Applications except remove the following rights under paragraph (b):

- a. to possess, occupy, use and enjoy the area;
- b. the right to make decisions about the traditional use and enjoyment of the area;
- d. the right to control the access of others to the area for traditional purposes;
- h. the right to maintain, protect and prevent the misuse of cultural knowledge associated with the area

[End of document]