National Native Title Tribunal

Registration Decision

Application name	Caroline Wilson and Ors on behalf of the Wirangu No 2 Native Title Claim Group and the State of South Australia and Ors named in the Schedule (**Wirangu No 2**)
Name of applicant	Caroline Wilson; Cindy Morrison; Barry Dean (Jack) Johncock; Elizabeth Pool; Neville Miller; Kenneth Wilson; Vernon (Penong) Miller
Federal Court of Australia No.	SAD6019/1998
NNTT No.	SC1997/006
Date of Decision	15 May 2020

Claim accepted for registration

I have decided that the claim in the amended Wirangu No 2 application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).[1] Therefore the claim must be accepted for registration and will remain on the Register of Native Title Claims.

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Katy Woods

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Native Title Act.

[1] A section reference is to the *Native Title Act 1993* (Cth) (**Native Title Act**), unless otherwise specified.

Reasons for Decision

Cases cited

Attorney-General of the Northern Territory v Ward [2003] FCAFC 283 ***(Ward FC No 2)***
Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (***Aplin***)
Corunna v Native Title Registrar [2013] FCA 372 (***Corunna***)
De Rose v State of South Australia (No 2) [2005] FCAFC 110 (***De Rose FC No 2***)
Fesl v Delegate of the Native Title Registrar (2008) 173 FCR 150; [2008] FCA 1469 (***Fesl***)
Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (***Warrie***)
Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (***Gudjala 2007***)
Gudjala People # 2 v Native Title Registrar (2008) 171 FCR 317; [2008] FCAFC 157 (***Gudjala 2008***)
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)***
Kanak v National Native Title Tribunal (1995) 61 FCR 103; [1995] FCA 1624 (***Kanak***)
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) 194 ALR 538; [2002] HCA 58 (***Yorta Yorta***)
Noble v Mundraby [2005] FCAFC 212 (***Noble***)
Northern Land Council v Quall [2019] FCAFC 77 ***(Quall)***
Northern Territory of Australia v Doepel (2003) 133 FCR 112; [2003] FCA 1384 (***Doepel***)
Strickland v Native Title Registrar [1999] FCA 1530 (***Strickland***)
Wakaman People # 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (***Wakaman***)
Ward v Northern Territory [2002] FCA 171 ***(Ward v Northern Territory)***
Ward v Registrar, National Native Title Tribunal (1999) 168 ALR 242; [1999] FCA 1732 (***Ward v Registrar***)
Western Australia and Northern Territory v Lane (1995) 59 FCR 332; [1995] FCA 1484 (***Lane***)
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 (***WA v NTR***)
Western Australia v Ward (2002) 213 CLR 1; [2002] HCA 28 (***Ward HC***)
Wiri People v Native Title Registrar [2008] FCA 574 (***Wiri People***)

Background

[1] This claim has been made on behalf of the Wirangu native title claim group (**claim group**). It covers the land and waters of an area of approximately 8,790 square kilometres on the Eyre Peninsula in South Australia (**application area**).

[2] This claim was first made on 28 August 1997 and was entered onto the Register of Native Title Claims (**Register**) that same day, in accordance with the provisions of the Native Title Act which were current at the time. The application was amended on 12 March 1999 and again on 25 January 2000. The claim was first considered by a delegate of the Native Title Registrar

(**Registrar**) under s 190A on 5 February 2000 who decided it met all the conditions in ss 190B–190C, and so the claim remained on the Register.

[3] The amended application which is currently before me (**application**) was filed on 28 February 2020 and the Registrar of the Federal Court (**Court**) gave a copy to the Registrar on 3 March 2020, pursuant to s 64(4). This referral has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.[2]

[4] The granting of leave by the Court to amend the application was not made pursuant to s 87A, and so the circumstance described in s 190A(1A) does not arise. The amendments to the application are greater than the changes prescribed by s 190A(6A), so that provision does not apply. Therefore, in accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C.

[5] For the reasons below, I consider the claim in the application meets all the conditions of the registration test. Attachment A contains the information which will be included on the Register.

Procedural fairness

[6] On 28 February 2020, the applicant requested that I have regard to the following documents (collectively, the **additional material**):

(a) 'Anthropological Report for the Wirangu No 2 Native Title Claim Part A', 27 May 2019, Phillip A Clare and Jeffery J Stead (**Expert Report**);

(b) Affidavit of [name removed], 10 October 2019 (**Claimant 1 affidavit**);

(c) Affidavit of [name removed], 11 October 2019 (**Claimant 2 affidavit**);

(d) Affidavit of [name removed], 11 October 2019 (**Claimant 3 affidavit**);

(e) Affidavit of [name removed], 10 October 2019 (**Claimant 4 affidavit**);

(f) Affidavit of [name removed], 10 October 2019 (**Claimant 5 affidavit**); and

(g) 'Submissions in relation to the occupation evidence in support of Wirangu reliance on s 47B *Native Title Act 1993* (Cth)' (**Submissions**).

[7] Also on 28 February 2020, the applicant provided further material for my consideration, under a covering letter titled 'Material in support of the certification of Wirangu No 2 and Wirangu No 3' (**authorisation material**).

[8] I reviewed the additional material and authorisation material and considered that the documents contained information relevant to my consideration of ss 190B(5)–(7) and s 190C(4). Therefore, on 5 March 2020, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative for the South Australian government (**State**), advising that I would be considering the information in the application, the additional material and the authorisation material in my decision, and should the State wish to supply any information or make any submissions, it should do so by 13 March 2020.

[2] Section 190A(1).

[9] Also on 5 March 2020, the senior officer wrote to the applicant's representative to advise that any further additional information the applicant wished me to consider should be provided by 13 March 2020.

[10] No submissions were received from the State and no further information was received from the applicant, so this concluded the procedural fairness process.

Information considered

[11] I have considered the information in the application, the additional material and the authorisation material provided by the applicant, as outlined above.[3]

[12] I have considered information contained in a geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 11 March 2020 (**geospatial report**), in relation to the sufficiency of the map and description. I have considered information from the Tribunal's geospatial database regarding this claim's location in relation to other claims in the vicinity and locations mentioned in the application and the additional material. I have also considered information held on the Register.[4]

[13] There is no information before me obtained from any searches of State or Commonwealth interest registers.[5]

Section 190C: conditions about procedures and other matters

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

[14] To meet s 190C(2), the Registrar must be satisfied the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–2. I am not required to undertake a merit assessment of the material at this condition.[6] I have not addressed s 61(5) as I consider the matters covered by that provision are matters for the Court.

[15] With regard to s 62, I am considering this claim against the requirements of that provision as it stood prior to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* (Cth) on 1 September 2007. That legislation made some minor technical amendments to s 62 which only apply to claims made from 1 September 2007 onwards, and the claim before me was made before that date.

[16] The application contains the details specified in s 61:

Section	Details	Form 1	Result

[3] Section 190A(3)(a).
[4] Section 190A(3)(c).
[5] Section 190A(3)(b).
[6] *Doepel* [16], [35]–[39].

s 61(1)	Native title claim group has authorised the applicant	Part A(2), Schedule A, s 62 affidavits of the applicant members filed with application (**s 62 affidavits**)	Met
s 61(3)	Name and address for service	Part B	Met
s 61(4)	Native title claim group named/described	Schedule A	Met

[17] The application contains all the information specified in s 62:

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

Conclusion

[18] As the application contains all of the prescribed details and other information, as required by ss 61–2, I am satisfied s 190C(2) is met.

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

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

(a) the application must overlap the current application in whole or part;

(b) there must be an entry for the claim in the previous application on the Register when the current application was made; and

(c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[20] The geospatial report states and my own searches confirm there is one application which overlaps the current application, being the Nauo #3 application (SAD63/2018). However there was no entry for the Nauo #3 claim on the Register when this application was made on 28 August 1997. Therefore, the Nauo #3 application does not meet the definition of a 'previous application' under s 190C(3). This means that the issue of common claimants does not arise.

Conclusion

[21] I am satisfied that no person included in the claim group was a member of a native title claim group for any previous application, and so s 190C(3) is met.

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

[22] To meet s 190C(4), the Registrar must be satisfied that either:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

[23] Schedule R states 'Certification by SANTS is provided in Attachment R'. Attachment R contains a document titled 'Certification by Native Title Service Provider (SANTS)'. As the application purports to be certified, I must first consider whether the requirements of s 190C(4)(a) are met. If the requirements of s 190C(4)(a) are not met, I must consider whether the application is authorised in accordance with s 190C(4)(b).

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

[24] To meet s 190C(4)(a), I must be satisfied that:

(a) the certificate identifies the relevant representative body;

(b) the representative body has the power under Part 11 to issue the certification; and

(c) the certificate meets the requirements of s 203BE(4).[7]

Is the relevant representative body identified?

[25] South Australian Native Title Services Ltd (**SANTS**) has provided the certificate. The geospatial report states that the SANTS is the only representative body for the whole of the application area. I have verified this information against current data in the Tribunal's national map of Representative Aboriginal and Torres Strait Islander Body areas. That map shows SANTS to be the recognised representative body for the area covering the application area, pursuant to s 203FE(1). I am therefore satisfied the certificate identifies the relevant representative body.

Does the representative body have the power to issue the certification?

[26] As SANTS is funded to perform all of the functions of a representative body pursuant to s 203FE, it can perform all of the functions listed in Part 11, including the certification functions in s 203BE. Although not stated on the certificate, I infer that it has been provided pursuant to s 203BE.

[27] The certificate has been signed by two directors 'duly authorised for and on behalf of' SANTS, on 20 and 23 September 2019 respectively. I note that the Full Court in *Quall* considered the certification of applications for registration of indigenous land use agreements (ILUAs) under s 203BE(b) by representative bodies, and held that a representative body may not delegate its

[7] *Doepel* [80]–[81].

functions under s 203B(1).[8] However in *McGlade No 2*, the Full Court distinguished *Quall* because that decision concerned a representative body established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), and held that corporations established under the *Corporations (Aboriginal & Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) can conduct their business through their directors and/or authorised employees and agents.[9]

[28] I understand that SANTS has not been established under the CATSI Act but is registered as a public company limited by guarantee under the *Corporations Act 2001* (Cth) (**Corporations Act**). With regard to the delegation of powers, s 274-10 of the CATSI Act reflects the wording of s 198D of the Corporations Act. I therefore consider that delegation to directors and authorised employees of the conduct of business of corporations established under the Corporations Act can be similarly distinguished from *Quall.*

[29] In light of these recent case law developments, I am of the view that it was within SANTS's power under Part 11 to issue this certification.

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

[30] I have considered each of the requirements of s 203BE(4) in turn below.

Section 203BE(4)(a) – statements

[31] Section 203BE(4)(a) requires a representative body to state that it is of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met.

[32] Section 203BE(2)(a) prohibits a representative body from certifying an application unless it is of the opinion that all persons in the claim group have authorised the applicant to make the application and to deal with matters arising in relation to it.

[33] Section 203BE(2)(b) prohibits a representative body from certifying an application unless it is of the opinion that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

[34] As the certificate contains these required statements, I am satisfied s 203BE(4)(a) is met.

Section 203BE(4)(b) – reasons

[35] Section 203BE(4)(b) requires a representative body to briefly set out, its reasons for being of the opinion that the requirements of ss 203BE(2)(a)–(b) have been met.

[36] As the certificate does not set out any reasons for SANTS's opinion that ss 203BE(2)(a)–(b) are met, s 203BE(4)(b) is not met.

Section 203BE(4)(c) – overlapping applications

[37] Section 203BE(4)(c) requires a representative body to set out, where applicable, what it has done to meet the requirements of s 203BE(3).

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[8] *Quall* [102]–[104].
[9] *McGlade No 2* [329]–[330].

[38] Section 203BE(3) states that if the land or waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:

(a) achieve agreement, relating to native title over the land or waters, between the persons in respect of whom the applications are, or would be, made; and

(b) minimise the number of applications covering the land or waters.

However, a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

[39] The certificate does not set out what has been done to meet the requirements of s 203BE(3), however, in accordance with that provision, this failure does not invalidate the application.

[40] As the certificate which accompanies the application does not meet all the requirements of s 203BE(4), s 190C(4)(a) is not met. I must therefore consider whether the applicant has been authorised to make the application in accordance with s 190C(4)(b).

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

[41] Section 190C(4)(b) contains two limbs, both of which must be satisfied:

(a) that the applicant is a member of the claim group; and

(b) that the applicant is authorised to make the application, by all the other members of the claim group.

[42] Following s 190C(4)(b) there is a note in the Native Title Act referring to the definition of 'authorising the making of applications' in s 251B. That provision stipulates that all the persons in a claim group authorise a person to make an application and to deal with matters arising in relation to it, where one of the following processes of decision-making is utilised:

(a) a process that, under the traditional laws and customs of the persons in the claim group, must be complied with; or

(b) where there is no traditional process, a process agreed to and adopted by the claim group.

[43] The case law confirms that s 190C(4)(b) requires consideration of whether the identified native title holders have authorised the applicant to make the application in accordance with s 251B.[10]

[44] Section 190C(5) states that if the application has not been certified under s 190C(4)(a), the Registrar cannot be satisfied that the condition in s 190C(4) is met unless the application:

(a) includes a statement to the effect that the requirement in s 190C(4)(b) has been met; and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s 190C(4)(b) has been met.

[45] I therefore understand that in order to be satisfied that s 190C(4)(b) is met, one of the decision making processes outlined in s 251B must be identified and complied with, and the requirements of s 190C(5) must also be met.

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[10] *Wiri People* [26]–[36].

Summary of the authorisation material

[46] The information I have before me which I consider relevant to this condition is:

(a) The s 62 affidavits; and
(b) The authorisation material provided by the applicant on 28 February 2020.

Is s 190C(5) met?

[47] Each of the s 62 affidavits affirm that the deponent is a member of the claim group.[11] Each s 62 affidavit also states that the deponent was authorised by the claim group to make the application pursuant to an agreed to and adopted decision making process at an authorisation meeting held on 2 August 2019 (**authorisation meeting**).[12] Each s 62 affidavit describes the agreed to and adopted decision making process as one which required a majority vote by show of hands, by the claim group members present at the authorisation meeting and over the age of 18.[13]

[48] I note French J's comment that the insertion of the word 'briefly' in s 190C(5)(b) 'suggests that the legislature was not concerned to require any detailed explanation of the process by which authorisation is obtained'.[14] In my view, the information in the s 62 affidavits is sufficient to satisfy both limbs of s 190C(5). This means that s 190C(5) is met.

Is s 190C(4)(b) met?

[49] Firstly, I must be satisfied the person or persons comprising the applicant are members of the claim group. As noted above, each of the s 62 affidavits contains such a statement, so I am satisfied this requirement is met.

[50] Secondly, I must be satisfied the applicant is authorised to make the application, by all the other members of the claim group. I understand that the identification of the appropriate decision making process and whether it was complied with is a primary consideration for my task at s 190C(4)(b).[15] I understand that this task 'involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given'.[16]

Which decision making process under s 251B has been identified?

[51] As noted above, the s 62 affidavits indicate that an agreed to and adopted decision making process was used by the claim group to authorise the applicant to make the application. The application therefore identifies the type of decision making process provided for in s 251B(b).

[52] In *Fesl*, Logan J distilled the judicial authorities concerning s 251B and held that 'agreed to and adopted' imports the giving of a 'reasonable opportunity' to the claim group members to participate in the decision making process.[17] To establish whether a reasonable opportunity

[11] Section 62 affidavits [4].
[12] Ibid [5].
[13] Ibid.
[14] *Strickland* [57].
[15] *Noble* [16].
[16] *Doepel* [78].
[17] *Fesl* [71].

to participate was provided, I will consider the information before me about the notice and conduct of the authorisation meeting.

Notice of authorisation meeting

[53] The authorisation material details two meetings of the claim group, held on 24 August 2018 and 2 August 2019 respectively. In my view, the 2 August 2019 meeting, being the most recent, is the authorisation meeting relevant to my consideration at s 190C(4)(b).

[54] According to the authorisation material, notice of the authorisation meeting included:

(a) Public notice in the Advertiser, Port Lincoln Times and West Coast Sentinel in July 2019; and

(b) Personal notice by letter to the Wirangu claim group members whose addresses were held in the SANTS database, on 8 July 2019.

[55] A copy of the notice as it appeared in the Advertiser is included in the authorisation material, as is a copy of the letter sent to the claim group members, which enclosed the notice. Both the notice and the letter state the date, time and location of the authorisation meeting and provide a contact number for assistance. The notice states that one of purposes of the authorisation meeting is to authorise the applicant. The notice includes an overview map and two enlarged maps of the application area.

[56] The notice invites all members of the Wirangu No 2 claim group and all members of the Nauo No 3 claim group to attend. I understand from the Agenda which has been included in the authorisation material, that the Nauo No 3 claim group members were invited to Part 1 of the authorisation meeting to discuss the overlap between the application areas of the two claims. Part 2 of the authorisation meeting, at which the applicant was authorised, was only open to members of the Wirangu claim group.

Conduct of authorisation meeting

[57] According to the authorisation material, 31 Wirangu people attended the authorisation meeting and a copy of the attendance register has been provided.

[58] The resolutions passed by the Wirangu People in Part 2 of the authorisation meeting have also been provided, which show that the claim group unanimously passed Resolution 2, confirming there is no traditional decision making process which must be used, and agreed to and adopted the decision making process outlined above. By Resolution 4, the claim group unanimously voted to authorise the applicant members to make the application.

Consideration

[59] From the material before me, I consider that the notice of the authorisation meeting was wide in its reach and comprehensive in terms of the information it provided. The purpose of the authorisation meeting is clearly set out and a contact number provided for assistance. The inclusion of three maps of the application area, in my view, supplements the written information in the notice.

[60] Regarding the conduct of the authorisation meeting, I understand from the authorisation material that the agreed to and adopted decision making process was participatory and that the resolutions passed by the claim group were made in accordance with that process.

[61] In my view, the notice and the conduct of the authorisation meeting together demonstrate that the members of the claim group were given a reasonable opportunity to participate in the decision to authorise the applicant.[18]

[62] I note O'Loughlin J's theoretical questions about the meeting at which the applicant was authorised in the circumstances of the case of *Ward v Northern Territory*, the substance of which His Honour held must be addressed:

> Who convened it and why was it convened? To whom was notice given and how 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? [19]

[63] In my view, there is sufficient information to address the substance of all of those questions, such that I can be satisfied of the 'fact of authorisation'.[20] It follows that I am satisfied that the applicant is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the claim group.

Conclusion

[64] I consider there is sufficient information to show that the persons who make up the applicant are members of the claim group, and have been authorised by all the members of the claim group using an agreed to and adopted decision making process, in accordance with s 251B(b). This means the requirements of s 190C(4)(b) are satisfied. I also consider that the requirements of s 190C(5) are satisfied. Therefore, s 190C(4) is met.

Section 190B: merit conditions

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

[65] To meet s 190B(2), the Registrar must be satisfied 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.

[66] I understand the questions for this condition are whether the information and map provide certainty about:

(a) the external boundary of the area where native title rights and interests are claimed; and
(b) any areas within the external boundary over which no claim is made.[21]

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[18] Ibid.
[19] *Ward v Northern Territory* [25]–[26].
[20] *Doepel* [78].
[21] Ibid [122].

Does the information about the external boundary meet this condition?

[67] Schedule B describes the application area as being within an external boundary described by metes and bounds, referring to parcel and Hundred boundaries, the centrelines of road reserves, the Lowest Astronomical Tide, Cape Bauer, native title determination and application boundaries, and coordinate points identified by longitude and latitude to six decimal places (GDA94).[22]

[68] Schedule C refers to Attachment C, which contains an overview map and 17 'enlargement maps'. The maps are titled 'SAD6019/1998 Wirangu No 2 SC1997/006' and are dated 25 February 2020. The maps include:

(a) The Application Area boundary depicted with bold blue outline;

(b) The Excluded Area parcel boundaries (as listed in Schedule B), depicted with bold purple outline on the overview map and with a transparent light purple fill on the enlargement maps, identified by DCDB ID;[23]

(c) Road reserves and other parcel boundaries depicted with a light cyan outline, identified respectively by road name and DCDB ID;

(d) A general background topographic image on the overview map, and a background of aerial imagery on the enlargement maps;

(e) Locality map, scalebar, coordinate grid (GDA20);[24] and

(f) Notes relating to the source, currency and datum of data used to prepare the map.

[69] The assessment in the geospatial report is that the map and description are consistent and identify the application area with reasonable certainty. I have considered the map and description and I agree with that assessment.

Does the information about excluded areas meet this condition?

[70] Schedule B states that land which was freehold, held under a perpetual lease or 'is otherwise an exclusive possession act', on the date the claim was lodged, is excluded from the application. With regard to these types of general exclusion clauses, French J commented that 'it is unrealistic to expect a concluded definition of the areas subject to these provisions to be given in the application. Their applicability to any area will require findings of fact and law to be made as part of the hearing of the application'.[25] Following this reasoning, I am satisfied the description of the areas covered by the general exclusion clause in Schedule B will be sufficient to ascertain any such areas at the appropriate time.

[71] Schedule B specifically excludes 'any parcels of land included within the Wirangu No 3 determination application filed on 28 October 2019, SAD228/2019 as amended' and further specifies those areas in a table listing 40 specific parcels of which fifteen are identified as 'parcel portions'.

[22] Geocentric Datum of Australia 1994.
[23] Digital Cadastral Database Identifier.
[24] Geocentric Datum of Australia 2020.
[25] *Strickland* [55].

[72] In my view, the specific exclusions are clear from the description in Schedule B.

Conclusion

[73] As both the external boundary and the excluded areas of the application can be identified from the map and description with reasonable certainty, I am satisfied that s 190B(2) is met.

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

[74] To meet s 190B(3), the Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application; or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[75] I understand I am not required to do more than make 'an assessment of the sufficiency of the description of the group for the purpose of facilitating the identification of any person as part of the group' at this condition.[26] I also understand that the requirements of s 190B(3) 'do not appear to go beyond consideration of the terms of the application', which means I have limited my consideration to the information in the filed application.[27]

[76] Schedule A states:

> The members of the native title claim group on whose behalf the application is made are the descendants of any of the following apical ancestors including those who have been adopted by them and their descendants in accordance with Wirangu traditional law and custom: [list of named apical ancestors].

[77] It follows from the description that s 190B(3)(b) is applicable. I must therefore consider whether the description is sufficiently clear, so as to ascertain whether any particular person is in the claim group.

Is the description sufficient to ascertain the members of the claim group?

[78] The Court has previously held that describing a claim group with reference to descent from named ancestors satisfies the requirements of s 190B(3)(b).[28] I consider that requiring a person to show descent from an identified ancestor provides a clear objective starting point from which to commence enquiries about whether a person is a member of the claim group. I consider that factual enquiries would lead to the identification of the people who qualify for membership of the claim group as descendants of the named apical ancestors.

[79] The Court has also accepted the approach of including descent by adoption in the description of a claim group.[29] In *Aplin*, Dowsett J commented that '[a]s to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs'.[30] The opening paragraph of Schedule A references the traditional laws and customs of the claim group, and I consider that the traditional laws and customs would provide the appropriate 'set

[26] *Wakaman* [34].
[27] *Doepel* [16].
[28] *WA v NTR* [67].
[29] Ibid.
[30] *Aplin* [256]–[261].

of rules or principles' through which it could be ascertained whether an adopted person is a member of the claim group.[31]

Conclusion

[80] I am satisfied the application describes the persons in the claim group sufficiently clearly such that it can be ascertained whether any particular person is a member of the group as required by s 190B(3)(b). This means s 190B(3) is met.

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

[81] To meet s 190B(4), the Registrar must be satisfied the description contained in the application is sufficient to allow the claimed native title rights and interests to be identified. The claimed rights and interests must be understandable and have meaning.[32] I have not considered whether the rights and interests claimed can be considered 'native title rights and interests' in accordance with s 223 as I consider that is part of the task at s 190B(6), where I must decide whether the claimed rights are established as native title rights on a prima facie basis.

[82] I understand from paragraph (a) of Schedule E that exclusive possession is claimed in areas where it can be recognised, such as areas where there has been no prior extinguishment of native title or where s 238 or ss 47–47B apply.

[83] From paragraph (b) of Schedule E, I understand that in areas where exclusive possession cannot be recognised, eight non-exclusive rights and interests are claimed.

[84] Paragraph (c) of Schedule E states that the native title rights claimed are subject to the valid laws of the State and the Commonwealth and to the rights conferred upon persons pursuant to those laws. In my view, the limitations on the claimed rights and interests are clear.

Conclusion

[85] I am satisfied the description is sufficient to understand and identify all the claimed rights and interests, which means s 190B(4) is met.

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

[86] To meet s 190B(5), the Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist, is sufficient to support the following assertions:

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

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

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

[31] *Ward v Registrar* [25].
[32] *Doepel* [99].

[87] I understand my task is to assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.[33]

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

[88] Schedule F provides a brief summary of the factual basis asserted in relation to each limb of s 190B(5), and refers to Attachment F. Attachment F contains 'summaries of proposed evidence' from three claim group members. The Expert Report, which forms part of the additional material provided by the applicant on 12 November 2019 provides detailed information about the factual basis of the claim and so my reasoning will focus on the information in that document.

What is required to meet s 190B(5)(a)?

[89] To meet s 190B(5)(a) the factual basis must be sufficient to show:

(a) the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since sovereignty or European settlement;[34]

(b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';[35] and

(c) there is an association with the entire area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.[36]

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

[90] Schedule F provides that settlement in the application area occurred with the arrival of pastoralists in the 1840s. The Expert Report further provides the following information with regard to the association of the claim group prior to British sovereignty and at the time of settlement:

(a) In 1800-1801, during his circumnavigation of Australia, Matthew Flinders observed the bark huts and paths of the people living on the Eyre Peninsula, and 'heard their calls to each other';[37]

(b) In the 1840s, in the early years of settlement, frontier conflicts occurred between the local inhabitants and pastoralists in the Elliston district in the south of the application area;[38]

(c) Also in the 1840s, an eagle mythology was recorded in the region of the application area by one of the first European settlers;[39]

[33] *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].
[34] *Gudjala 2007* [52].
[35] Ibid.
[36] *Martin* [26]; *Corunna* [39], [45].
[37] Expert Report [166].
[38] Ibid [52]–[53].

(d) In the 1850s–1860s, ration depots were established in the application area including at Streaky Bay and Venus Bay, where a number of Aboriginal people worked for the respective pastoralists in exchange for rations;[40]

(e) In the 1870s, 'a strong Aboriginal presence' was recorded in the application area, with reports of people hunting and camping in the Mount Wedge, Elliston and Kyancutta areas.[41] Wirangu burial practices were recorded in the Streaky Bay region of the application area;[42]

(f) Also in the 1870s, the Wirangu guide to explorer Ernest Giles identified and described the track of a mythological snake which traverses the application area, coming from the Musgrave Ranges in the north and travelling down to the sea;[43]

(g) In 1875, a corroboree was recorded at Venus Bay in the application area, which 200 Aboriginal people attended;[44]

(h) In the late decades of the 1800s, pastoralists and researchers used the term 'Wirrung' (variously spelled) to describe the people who occupied the western part of the Eyre Peninsula (including the application area), and their language;[45]

(i) In the early 1900s, historical records describe trade routes running through and beyond the application area, and Ooldea soakage, 'on the northern border of Wirangu territory' was recorded as a place where 'trade, dispute, settlement and initiation occurred';[46]

(j) In 1930, a Wirangu informant to Elkin described parts of the Wombat and Seal mythology in which an ancestral being travelled along the coast of the application area to Streaky Bay and then west towards Port Lincoln.[47]

[91] The Expert Report summarises the historical and anthropological information about each of the claim group's apical ancestors and their descendants, for example:

(a) Apical ancestor Kulbula was a Wirangu man born around 1830 who had four children, including a son born in 1860 at Euria to the north west of the application area;[48]

(b) Apical ancestor Eliza Ellen was born around 1840 at Streaky Bay in the application area. She had three children at Streaky Bay, born in 1859, 1860 and 1862 respectively;[49]

(c) Apical ancestor Bilunyua was born in 1855 and her 'run' was located inland from Streaky Bay. Bilinyua and apical ancestor Kaltyna's son is also remembered as being from Streaky Bay;[50]

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[39] Ibid [106].
[40] Ibid [57]–[59].
[41] Ibid [61].
[42] Ibid [118].
[43] Ibid [107].
[44] Ibid [63].
[45] Ibid [33]–[36].
[46] Ibid [136].
[47] Ibid [250].
[48] Ibid [369]–[370].
[49] Ibid [336]–[341].
[50] Ibid [328].

(d) The mother of the apical siblings Nellie, Frank and Kwana Gray was recorded as being from 'back of Ooldea', being the northern most extent of Wirangu country, with her birth date estimated as being in the 1850s.[51]

[92] With regard to the intervening generations, the Expert Report provides:

(a) The 1935 census recorded Aboriginal people, including some of the apical ancestors and their descendants, living in the application area at Minnipa, Streaky Bay, Wirrulla and Wudinna Aboriginal Reserve, who were also observed fishing and digging for yams;[52]

(b) In the 1940s, Wirangu people, including some descendants of apical ancestor Annie Wombat, continued to live at Streaky Bay and Wudinna, as well as at a camp near Perlubie Beach in the application area;[53]

(c) In the 1960s, Wirangu families camped along the coast between Streaky Bay and Elliston during holidays, and there was also a permanent 'fishing camp' near Elliston where Wirangu families would live for extended periods, fishing and foraging for crabs and cockles.[54]

[93] The Expert Report also provides many examples of the association which current claim group members have to the application area, including:

(a) The claim group learned from their predecessors the spiritual track of the eagle dreaming, which travels from Glen Boree in the north, through the application area to a significant men's site near Port Kenny, and then south to the Marble Ranges ;[55]

(b) The Wombat and Seal dreaming, which travels through the application area, has also been passed down to the current claim group, with a significant location connected to the story now distinguished by signage at Point Labatt on the southern edge of the application area;[56]

(c) Ceremonial sites used by their predecessors are known to the current claimants, including places in the application area at Ucontitchie Hill and Wudinna Rock;[57]

(d) Claimants maintain a physical association with the application area through cultural heritage work such as surveys, excursions and day camps.[58]

[94] As noted above, Attachment F contains the 'summaries of proposed evidence' from three claim group members. These summaries contain information about the association current claim group members have with the application area. For example, claim group member [name removed] (**Claimant 6**) lived at Wirrulla as a child and would 'walk all over the place', and at that time old people lived there 'in humpies they built themselves'.[59] Claimant 6 later moved to Warramboo, just outside the application area to the east, where other Wirangu

[51] Ibid [388].
[52] Ibid [75]–[77].
[53] Ibid [78]–[79].
[54] Ibid [299]–[300].
[55] Ibid [237]–[241].
[56] Ibid [247]–[249].
[57] Ibid [432].
[58] Ibid [216], [490].
[59] Attachment F, summary of proposed evidence of Claimant 6 [20], [22].

people were also living.[60] She recalls camping on Wirangu country with her grandparents and parents, who would tell her stories around the camp fire.[61] She recalls hunting for wombats and kangaroos as a child with her family, and continues to go hunting on Wirangu country.[62] In her summary of proposed evidence, [name removed] (**Claimant 8**) describes a similar association with the application area, and recalls apical ancestor Annie Wombat doing 'her own thing, moving up and down on Wirangu country. She didn't live in a house but on the land'.[63]

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

[95] I have assessed the sufficiency of the information summarised above against the requirements of s 190B(5)(a) below. I understand that in assessing the factual basis for the purposes of s 190B(5)(a), I am not obliged to accept very broad statements which have no geographical particularity.[64] I note the comments in *Strickland*, that '[t]he requirements of the registration test are stringent. It is not necessary to elevate them to the impossible'.[65] I also consider the comments in *Lane* are relevant, in that the Registrar's statutory obligations should be performed with a degree of flexibility consistent with the beneficial nature of the legislation.[66] I have therefore assessed the sufficiency of the factual basis by applying this judicial guidance and taking into account the features of this application. To this end, I note the information in the Expert Report about the heavy impact of agricultural development in the application area and the challenges faced by the claim group throughout the settlement period.[67]

Does the application support an association between the claim group at sovereignty and since that time?

[96] The Expert Report brings together historical sources which support an association between the claim group and the application area since before the time of settlement. Information about each apical ancestor and their connection to the application area and the surrounding region has been provided. From this information I can infer that the apical ancestors, the oldest of whom was born in the 1830s, had an association with the application area at the time of settlement. The material indicates that the children of the apical ancestors had the same or similar association with the application area as their parents. I can therefore infer that the apical ancestors had a similar association with the application area as their predecessors, who would have been alive prior to British sovereignty. In making this retrospective inference, I have considered the judicial guidance of Lindgren J on making such inferences in *Harrington-Smith*, and of French J in *Kanak* on construing the Native Title Act beneficially.[68]

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[60] Ibid [23].
[61] Ibid [35]–[44].
[62] Ibid [52]–[57].
[63] Attachment F, summary of proposed evidence of Claimant 8 [11]–[12].
[64] *Martin* [25].
[65] *Strickland* [55].
[66] *Lane* [9].
[67] Expert Report [83].
[68] *Harrington-Smith* [294]–[296], *Kanak* [73].

[97] The historical record summarised in the Expert Report shows that members of the intervening generations of the claim group lived at various locations in the application area and continued to hunt, fish and forage, and knew the dreaming stories attached to the landscape. In Attachment F, senior claimants recall the 'old people' living in humpies and one of the apical ancestors moving around Wirangu country. In my view, the information in the Expert Report and Attachment F demonstrates that the generations between the apical ancestors and the current claim group maintained their association with the application area.

Does the application support an association between the claim group and the area currently?

[98] I consider that the information before me supports an association between the current claim group and the application area. In forming this view I have considered the examples in the Expert Report and in Attachment F, some of which I have extracted above, of claim group members continuing to access the application area to camp, hunt, fish and conduct cultural activities. In addition, there is detailed information before me about the spiritual association of the claim group with the application area, demonstrated through the current claim group's knowledge of the particular dreaming stories linked to physical features of the application area, told to them by their predecessors and documented in the historical record.

Does the application support an association, both past and present, with the whole area claimed?

[99] I understand that s 190B(5)(a) does not require all of the claim group members to have an association with the entirety of the application area at all times, but rather requires that the claim group has an association with the area 'as a whole'.[69] Following this judicial guidance, I consider there is information in the application to support an association by the claim group, past and present, with the whole of the application area, sufficient for the purposes of s 190B(5)(a). This is because there is information about past and present claim group members living, camping, hunting and fishing in areas throughout and around the application area. There is also information to support an ongoing spiritual association with the application area, demonstrated through the knowledge passed down through the generations since the time of settlement about dreaming stories which traverse the length and breadth of the application area.

Conclusion – s 190B(5)(a)

[100] I consider that the information before me is sufficient to support the assertion that the claim group have, and its predecessors had, an association with the application area. I am satisfied there is sufficient factual basis to support an assertion of an association of the claim group to the whole application area. This means s 190B(5)(a) is met.

What is required to meet s 190B(5)(b)?

[101] To meet s 190B(5)(b), the factual basis must be sufficient to support an assertion that there exist traditional laws acknowledged and traditional customs observed by the claim group that give rise to the claim to native title rights and interests.

[69] *Corunna* [31].

[102] 'Native title rights and interests' is defined in s 223(1)(a) as those rights and interests 'possessed under the traditional laws acknowledged, and traditional customs observed,' by the native title holders. I have interpreted s 190B(5)(b) in light of the judicial consideration of s 223(1)(a), in which those same words appear.[70]

[103] In *Yorta Yorta* the plurality of the High Court held that a 'traditional' law or custom is one which has been passed from generation to generation of a society, usually by word of mouth and common practice. The High Court further held that in the context of the Native Title Act, 'traditional' also carries two other elements, namely:

> [I]t conveys an understanding of the *age of the traditions*: the origins of the content of the law or custom concerned are to be found in the *normative rules* of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. *It is only those normative rules that are "traditional" laws and customs*.;
>
> [T]he 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*. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist.[71]

[104] In *Warrie*, the Full Court held that:

> Where a rule, or practice or behaviour in relation to the identified land and waters arises from traditional law, and has normative content, then it can be capable of satisfying para (a) of s 223(1).;
>
> *[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*, there is no further gloss or overarching requirement, and no further rigidity. The Native Title Act in terms does 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.[72]

[105] In *Gudjala 2009*, Dowsett J held that if descent from named ancestors is the basis of membership of the group, the factual basis must demonstrate some relationship between those ancestors and the pre-sovereignty society from which the laws and customs of the claim group are derived.[73]

[106] I therefore understand my assessment of the sufficiency of the factual basis under s 190B(5)(b) requires the identification of:

(a) a link between the pre-sovereignty society, the apical ancestors and the claim group in the application area; and

(b) the continued observance of normative rules by the successive generations of the claim group, such that the normative rules can be described as 'traditional laws and customs'.

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[70] *Gudjala 2007* [26], [62]–[66], which was not criticised by Full Court on appeal in *Gudjala 2008*.
[71] *Yorta Yorta* [46]–[47], emphasis added.
[72] *Warrie* [105], [107], emphasis added.
[73] *Gudjala 2009* [40].

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

[107] The Expert Report asserts that there was a pre-sovereignty society which included the application area, identifiable through shared spiritual beliefs; social organisation into moieties prescribing marriage and other relationships;[74] and spiritually and descent-based territorial clans through which rights to particular areas were inherited.[75] Specific to the application area, the members of the society were further identifiable through their use of the Wirangu language.[76] The authors opine that the pre-sovereignty society, at its widest, formed a 'culture bloc' comprising the Wirangu, their neighbours to the east, the Nauo and Barngarla people, and possibly the Mirning people to the west.[77] As discussed above at s 190B(5)(a), the Expert Report states that the people in this society were also linked through trade routes which saw the bartering of goods into and out of the application area.[78]

[108] According to the Expert Report, in the 1850s the exclusive nature of the descent-based territorial rights was observed by the fact that in relation to such an area, 'no other natives dare hunt on it' and that there were sanctions for unauthorised entry.[79] In the 1920s, Tindale recorded camping areas utilised only by particular Wirangu families or groups.[80] Today, the inheritance of rights and responsibility for the application area, and a spiritual attachment to it, continues to be observed by the claim group.[81] For example, [name removed] (**Claimant 7**) states that he can 'go anywhere' on Wirangu country and does not need to seek permission.[82] Through him, his children have acquired the same rights, that is: '[w]hen they are on Wirangu country, then they know it is somewhere they can go – they have permission, they don't have to ask anyone'.[83]

[109] As discussed above at s 190B(5)(a), the mythologies recorded in the application area in the early years of settlement are known to the current claim group. In addition to providing a spiritual link to particular features of the landscape, the Expert Report states that these mythologies provide normative behaviours which the claim group observed at the time of settlement and continue to observe. For example, in the 1930s senior Wirangu informants stated that the mythological snake's territory, which included caves and blowholes, was to be avoided.[84] The Eagle dreaming contains a story of a mythical ancestor 'who was speared for marrying the wrong woman'.[85] The men's site at Murphy's Haystacks, associated with the eagle dreaming is avoided by women who continue to be taught to not 'look that way' when in the

[74] Expert Report [92]–[94], [144].
[75] Ibid [95]–[98], [149].
[76] Ibid [31]–[36].
[77] Ibid [99]–[100], [210].
[78] Ibid [135]–[138].
[79] Ibid [124].
[80] Ibid [158].
[81] Ibid [265], [268].
[82] Attachment F, summary of proposed evidence of Claimant 7 [43].
[83] Ibid [38].
[84] Expert Report [109]–[110].
[85] Ibid [244].

area.[86] Claimants recall that going to the wrong place as children resulted in punishment by the elders.[87]

[110] According to the Expert Report, the Wombat and Seal mythology, recorded in the early years of settlement, provides norms of economic behaviour to the claim group. The myth describes an ancestral being coming along the coast and leaving fish at particular places, where men could then find them. The authors opine that this demonstrates 'the process by which these ancestral beings influenced economic behaviour'.[88] The historical record reveals the Wirangu people used specialist techniques including torch lit fishing and particular fish traps.[89] Current claimants describe how they continue to fish, hunt and prepare food in accordance with the rules taught to them by their predecessors. For example, one claimant describes the customary rules for cooking shellfish and the rules pertaining to the apportionment of lizard meat.[90] Claimant 7 states that his father and uncles taught him to fish and that he has taught his children.[91]

[111] Wirangu burial practices were first recorded in the 1870s and later by Elkin in the 1930s in the Streaky Bay region.[92] Current claimants have been taught the location of burial sites in the application area by their predecessors, as well as other places where the spirits of deceased ancestors are believed to reside, such as massacre sites.[93]

[112] As discussed above at s 190B(5)(a), in 1875 a corroboree was recorded at Venus Bay which 200 people attended.[94] Claimant 7 describes how Wirangu people as well as people from the surrounding region continue to gather for ceremonies, particularly funerals, at which traditional customs continue to be practised.[95] Claimant 8 describes how as a child she was taught at ceremonies to make the 'right noise for the dancing' by clapping in particular ways.[96]

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

Does the factual basis support a link between the pre-sovereignty society, the apical ancestors and the claim group?

[113] I consider that there is sufficient information in the Expert Report about the pre-sovereignty society which included the application area, and about the Wirangu people who were members of that society prior to, and at the time of European settlement. From the information in Attachment F and the Expert Report, I understand that only a few generations separate the apical ancestors from the current claim group, and that senior members of the claim group recall some of the apical ancestors and other elderly predecessors living in the application area. I understand that those ancestors who were alive in the early decades of

[86] Ibid [241].
[87] Ibid [301], [442].
[88] Ibid [250]–[251].
[89] Ibid [197].
[90] Ibid [292]–[293].
[91] Attachment F, summary of proposed evidence of Claimant 7 [63].
[92] Expert Report [118].
[93] Ibid [228]–[231].
[94] Ibid [63].
[95] Attachment F, summary of proposed evidence of Claimant 7 [113].
[96] Attachment F, summary of proposed evidence of Claimant 8 [51].

settlement would have lived with forebears who were members of the pre-sovereignty society. I therefore consider that the material demonstrates a link between the current claim group, the apical ancestors and that pre-sovereignty society.[97]

Is the factual basis sufficient to support the assertion of the existence of 'traditional laws and customs'?

[114] In my view, there is sufficient information about how the laws and customs have been acknowledged and observed by the current members of the claim group as well as the previous generations, to support the assertion that the laws and customs are 'traditional' in the *Yorta Yorta* sense.[98] As summarised above, laws pertaining to the inheritance of rights to land have been recorded throughout the historical period and continue to be observed today. The spiritual beliefs of the claim group, told through the various dreaming stories, continue to prescribe the normative behaviours of the claim group, such as the sanctions on accessing particular sites and the rules specifying the correct methods of fishing and hunting. Ceremonial customs have been passed down to the current claim group by their predecessors. I consider these examples and others in Attachment F and the Expert Report provide a sufficient factual basis to support the assertion of 'traditional laws and customs', that is, laws and customs which were in existence prior to British sovereignty and have been observed and passed down through the generations to the current claim group through oral transmission and common practice.

Conclusion – s 190B(5)(b)

[115] I am satisfied the factual basis is sufficient to support the assertion that there exist traditional laws acknowledged, and traditional customs observed, by the claim group. This means s 190B(5)(b) is met.

What is required to meet s 190B(5)(c)?

[116] 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.[99] It also requires a sufficient factual basis to support an assertion that there has been continuity in the observance of traditional laws and customs going back to sovereignty or at least to European settlement.[100]

Is the factual basis sufficient to support the assertion of the continuity of 'traditional laws and customs'?

[117] As discussed above at s 190B(5)(b), I am satisfied that there exist traditional laws and customs, including the laws pertaining to descent-based rights to land, and the normative use of natural resources in accordance with the claim group's spiritual beliefs.

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[97] *Gudjala 2009* [40].
[98] *Yorta Yorta* [46]–[47].
[99] *Gudjala 2009* [29].
[100] *Gudjala 2007* [82].

[118] With regard to the continuity of the claim group's traditional laws and customs, there are salient examples found in Attachment F. For example, Claimant 7 describes how he has passed down his knowledge to his children and grandchildren. In relation to one of his grandsons, Claimant 7 states '[h]e knows the bush way because we have taken him hunting for wombat and all. Recently [my wife] took him out so he could go hunting and he knew what to do to get wombat by himself'.[101] Claimant 7 also explains how Wirangu people continue to observe the kinship system of their predecessors, which prescribes marriages and the naming of babies.[102]

[119] Claimant 8 provides another example when she describes learning from her predecessors the 'Wirangu way' whilst on country, and goes on to state:

> That is the same with my kids and grannies. I take them with me and they learn by [watching] me … We walk around together just as I did and just as my parents, my aunties and uncles and Wirangu before them. We go to the same places and do the same things together that I did when I was growing up and just like my parents did with their parents and grandparents – it goes right back like that.[103]

Is the factual basis sufficient to support the assertion of the continuity of traditional laws and customs?

[120] As summarised above in relation to ss 190B(5)(a)–(b), the factual basis supports the assertion of an ongoing association with the application area, and supports the existence of traditional laws and customs. The material before me provides examples of how the laws and customs have been passed down to current members of the claim group by their predecessors through oral transmission and common practice. In my view, the examples cited above support the assertion that the laws and customs of the claim group have been observed in the application area, since at least settlement, and that these laws and customs continue to be observed and passed down to younger members of the claim group. I consider the factual basis is sufficient to support the assertion that the claim group have continued to hold their native title rights in accordance with traditional laws and customs since settlement in the application area. The material before me demonstrates that claimants know how the generations since the apical ancestors acknowledged and observed their laws and customs in relation to the application area since the time of settlement. This permits an inference that the claim group is a 'modern manifestation' of the pre-sovereignty society.[104]

Conclusion – s 190B(5)(c)

[121] I consider the factual basis sufficient to support an assertion of continuity in the observance of traditional laws and customs, which means s 190B(5)(c) is met.

Conclusion

[122] As I am satisfied the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertions of ss 190B(5)(a)–(c), s 190B(5) is met.

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[101] Attachment F, summary of proposed evidence of Claimant 7 [34].
[102] Ibid [100]–[107].
[103] Attachment F, summary of proposed evidence of Claimant 8 [80].
[104] *Gudjala 2009* [31].

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

[123] To meet s 190B(6), the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed can be established. According to s 223(1), a 'native title right or interest' is one that is held under traditional laws acknowledged and traditional customs observed by the claim group.

[124] I note the following judicial guidance about s 190B(6):

(a) it requires some measure of the material available in support of the claim;[105]

(b) it appears to impose a more onerous test to be applied to the individual rights and interests claimed;[106] and

(c) the words 'prima facie' mean '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'.[107]

[125] It is not my role to resolve whether the asserted factual basis will be made out at trial. My task is to consider whether there is any probative factual material which supports the existence of each individual right and interest, noting that as long as some rights can be prima facie established, the requirements of s 190B(6) will be met. Only those rights and interests I consider can be established prima facie as native title rights will be entered on the Register. In my reasons below I have grouped rights together where it is convenient to do so.

Which of the claimed rights and interests are established on a prima facie basis?

Over areas where a claim to exclusive possession can be recognised … the 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.

[126] I note the majority's comment in *Ward HC* 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*'.[108]

[127] I also note the Full Court's observations in *Griffiths FC* 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*

[105] *Doepel* [126].
[106] Ibid [132].
[107] Ibid [135].
[108] *Ward HC* [93], emphasis added.

> *preventing such harm and avoiding injury to the country, then they have … an exclusive right of possession, use and occupation*.[109]

[128] The Full Court held in *Griffiths FC* that demonstrating the existence of exclusive rights depends on the consideration of what the evidence discloses about the right's content under traditional laws and customs.[110] I therefore understand that I must consider whether the material demonstrates that the traditional laws and customs of the claim group permit them to exercise control over others' access to the land and waters of the application area.

[129] As discussed above at s 190B(5), spiritual beliefs about creative beings who inhabit the landscape and set rules which govern traditional life have been passed down to the current claimants by their predecessors.[111] I understand that these beliefs give rise to normative behaviours to manage the risk of supernatural misfortune, with the observance of protocols for entry and sanctions for unauthorised entry.[112]

[130] From the information before me, I understand that as the descendants of the deceased ancestors and the holders of the relevant spiritual knowledge, the claim group members can enable safe access to country and permit use of its resources.[113] Through observance of the appropriate protocols, the claim group can exercise control over others' access to the application area and prevent the spirits resident in the land from causing harm or being harmed.[114] One claimant summarises the relevant beliefs thus:

> Wirangu people must look after country by speaking for it … I speak to the spirits of those places… Wirangu people must keep Wirangu country safe by visiting it and talking to it.[115]

[131] Based on the information before me, I consider the claimants are the 'gatekeepers for the purpose of preventing harm', as described in *Griffiths FC* above, and that the content of the traditional laws and customs shows how a right of exclusive possession operates in relation to the application area.

[132] I therefore consider 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. [the] 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

[133] At s 190B(5) above, I have extracted numerous examples of claim group members, past and present, accessing the application area for activities including ceremonies, camping, hunting and fishing, and using its resources for food.[116] Further relevant examples can be found in the

[109] *Griffiths FC* [127], emphasis added.
[110] Ibid [71].
[111] Expert Report [319]–[320].
[112] Ibid [126].
[113] Ibid [311]–[313].
[114] Ibid [228].
[115] Ibid [232].
[116] See for example, Expert Report [455].

Expert Report: one claimant recalls seeing 'old fellas by the fire, making boomerangs', and states that boomerangs are still made in the same way today.[117] I have also discussed above the historical information which supports the existence of a trade network through which objects were brought in and out of the application area using a barter system.[118] The Expert Report also provides that predecessors of the claim group traded mallee fowl eggs with settlers for flour.[119] Today, working in Indigenous heritage provides an opportunity for current claimants to trade in the resources of the application area.[120]

[134] I consider these rights are prima facie established.

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

[135] As discussed above in relation to the claimed right to exclusive possession, the beliefs of the claim group give rise to an obligation to 'look after country'.[121] In addition to speaking to the spirits which inhabit the landscape, I understand the claimants now exercise this right by participating in the management of national parks and cultural heritage clearances.[122]

[136] I consider this right is prima facie established.

Which of the claimed rights and interests are <u>not</u> established on a prima facie basis?

a. [the right] 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

[137] These rights appear to express a non-exclusive right using the terms of exclusive possession, which the High Court has held 'will seldom be appropriate'.[123] However the Full Court has since recognised the existence of such rights where control is only directed at other Aboriginal people who are governed by the claim group's traditional laws and customs.[124] However the above rights are not limited in such a way. In addition, I can find no information in the application to support the existence of these non-exclusive rights, or how they operate in the application area.

[138] I consider these rights are not prima facie established.

[117] Ibid [456].
[118] Ibid [135]–[138].
[119] Ibid [125]
[120] Ibid [497].
[121] Ibid [232].
[122] Ibid [478]–[479].
[123] *Ward HC* [51].
[124] *Ward FC No 2* [11]; *De Rose FC No 2* [169]–[170].

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

[139] In *Ward HC*, the majority agreed with the Full Court's finding that the scope of this claimed right 'goes beyond the content of the definition in s 223(1)'.[125] For completeness, I also note that the application does not provide any information regarding the operation of this right in the application area.

[140] I consider this right is not prima facie established.

Conclusion

[141] I am satisfied the application contains sufficient information about some of the rights claimed, such that they can be said to be established on a prima facie basis. I am also satisfied the claimed rights which are established prima facie can also be considered 'native title rights and interests'. This is because there is information in the application to show how those rights were observed by previous generations and in recent times. Additionally, according to the definition in s 223(1), a native title right or interest is one held under traditional laws and customs, and I am satisfied there is sufficient factual basis to support the assertion of the existence of traditional laws and customs, as discussed above at s 190B(5)(b). This means s 190B(6) is met.

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

[142] To meet s 190B(7), the Registrar must be satisfied that at least one member of the native title claim group:

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

(b) previously had and would reasonably have been expected currently to have such a connection but for things done by the Crown, a statutory authority of the Crown or any holder of or person acting on behalf of the holder of a lease, other than the creation of an interest in relation to land or waters.

[143] I note this condition requires the material to satisfy the Registrar of particular facts such that evidentiary material is required, and that the physical connection must be in accordance with the traditional laws and customs of the claim group.[126]

Is there evidence that at least one member of the claim group has or had a traditional physical connection to any part of the application area?

[144] Based on the information before me, I consider at least one claim group member currently has a traditional physical connection to the application area. In my view, the information I have extracted above at ss 190B(5)–(6) about claim group members accessing the application area for hunting and fishing, and using its resources for food, supports the existence of a physical connection.

[125] *Ward HC* [57]–[60].
[126] *Doepel* [18], *Gudjala 2009* [84].

[145] I also consider the claim group members' connection is 'traditional' in the sense required by s 190B(7). I consider the claimants' knowledge of the application area has been passed to them from the predecessors of the claim group while spending time on and around the application area. As I am satisfied the factual basis is sufficient to support an assertion that the laws and customs have been passed down to the current members of the claim group by their predecessors, it follows that I am satisfied the current claim group members' connection with the application area is in accordance with those traditional laws and customs.

Conclusion

[146] I am therefore satisfied at least one member of the claim group currently has a traditional physical connection with a part of the application area as required by s 190B(7)(a), and so s 190B(7) is met.

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

[147] I am satisfied the application complies with ss 61A(1)–(3) and so s 190B(8) is met:

Section	**Requirement**	**Information addressing requirement**	**Result**
s 61A(1)	No native title determination application if approved determination of native title	The geospatial report states and my own searches confirm that there are no approved determinations of native title in the area covered by this application.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule B, paras A, B and D state that any area in relation to which a previous exclusive possession act has been done, is excluded from the application.	Met
s 61A(3)	Claimant applications not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	Schedules E and L	Met – see reasons below

[148] Section 61A(4) states that s 61A(3) does not apply where an application states that ss 47–47B apply to it. Paragraph a) of Schedule E states that exclusive possession is only claimed over areas where it can be recognised, such as where ss 47–47B apply. In addition, Schedule L states that the claim group claims the benefit of ss 47–47B. Reading Schedule L together with Schedule E, it is my understanding that the claim group does not claim exclusive possession to the exclusion of all others in areas subject to previous non-exclusive possession acts, except to the extent that ss 47–47B may apply to any such areas.

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

[149] Section 190B(9) states that the application must not disclose, and the Registrar must not otherwise be aware that the claimed native title extends to cover the situations described in ss 190B(9)(a)–(c), as summarised in the table below. I am satisfied that s 190B(9) is met.

Section	Requirement	Information addressing requirement	Result
s 190B(9)(a)	No claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q states the Applicant does not claim ownership of minerals, petroleum or gas that are wholly owned by the Crown	Met
s 190B(9)(b)	Exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P states the Applicant does not claim exclusive possession of any offshore place	Met
s 190B(9)(c)	Native title rights and/or interests in the application area have otherwise been extinguished	There is nothing in the application which discloses that the native title rights in the application area have otherwise been extinguished	Met

End of reasons

Attachment A

Summary of registration test result

Application name	Caroline Wilson and Ors on behalf of the Wirangu No 2 Native Title Claim Group and the State of South Australia and Ors named in the Schedule (Wirangu No 2)
NNTT No.	SC1997/006
Federal Court of Australia No.	SAD6019/1998
Date of decision	15 May 2020

Section 186(1): Mandatory information

In accordance with ss 186, 190A(1) 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:

28 February 2020

Date application entered on Register:

15 May 2020

Applicant:

As per Schedule

Applicant's address for service:

As per Schedule

Area covered by application:

As per Schedule

Persons claiming to hold native title:

As per Schedule

Registered native title rights and interests:

a. 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.

b. 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;

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

_____

Katy Woods

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 27 July 2018 and made pursuant to s 99 of the Native Title Act.

15 May 2020