National Native Title Tribunal

Registration Decision

Application name	Neville Bilney & Ors and the State of South Australia (**Wirangu Sea Claim #2**)
Name of applicant	Neville Bilney, Cindy Morrison, Cheryl Saunders, Elizabeth Pool, Harry Miller, Kaylene Kerdel, Keenan Smith and Neville Miller
Federal Court of Australia No.	SAD84/2021
NNTT No.	SC2021/003
Date of Decision	25 June 2021

Claim accepted for registration

I have decided the claim in the Wirangu Sea Claim #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 entered on the Register of Native Title Claims (**Register**).

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Katy Woods

Delegate of the Native Title Registrar (**Registrar**) pursuant to ss 190–190D of the Native Title Act under an instrument of delegation dated 19 May 2021 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

Aplin on behalf of the Waanyi Peoples v State of Queensland [2010] FCA 625 (***Aplin***)
Corunna v Native Title Registrar [2013] FCA 372 (***Corunna***)
Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177 (***Warrie***)
Griffiths v Northern Territory [2007] FCAFC 178 (***Griffiths FC***)
Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (***Gudjala 2007***)
Gudjala People # 2 v Native Title Registrar [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 No 5**)*
Kanak v National Native Title Tribunal [1995] FCA 1624 (***Kanak***)
Lawson on behalf of the Badimaya Barna Guda People v State of Western Australia (No 2) [2021] FCA 468 (***Badimaya Barna Guda***)
Martin v Native Title Registrar [2001] FCA 16 (***Martin***)
Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 (***Yorta Yorta***)
Northern Land Council v Quall [2020] HCA 33 (***Quall HCA***)
Northern Territory of Australia v Doepel [2003] FCA 1384 (***Doepel***)
Strickland v Native Title Registrar [1999] FCA 1530 (***Strickland***)
State of Western Australia v Strickland [2000] FCA 652 (***Strickland FC***)
Wakaman People # 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 (***Wakaman***)
Ward v Registrar, National Native Title Tribunal [1999] FCA 1732 (***Ward v Registrar***)
Western Australia and Northern Territory v Lane [1995] FCA 1484 (***Lane***)
Western Australia v Native Title Registrar [1999] FCA 1591 (***WA v NTR***)
Western Australia v Ward [2002] HCA 28 (***Ward HC***)

Background

[1] This claim has been made on behalf of the Wirangu native title claim group (**claim group**). It covers approximately 1,445 square kilometres of land and waters in South Australia, including the intertidal zone along the western coastline of the Eyre Peninsula and several islands, the largest of which is Flinders Island (**application area**).

[2] The application was made on 18 May 2021 to the Federal Court of Australia (**Court**) and the Registrar of the Court gave a copy to the Registrar the same day, pursuant to s 63. This referral triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A (**the registration test**).

[3] On 3 June 2021, the Court ordered the application be split into 'Part A' and 'Part B', and dispensed with filing and service of any amended application.[2] As no amended application has been filed, I understand I must apply the registration test to the claim in the application

[2] Order of O'Bryan J in *Wirangu Sea Claim No 2* (Federal Court of Australia, SAD84/2021, 3 June 2021).

currently before me, in accordance with s 190A(1). The Court has previously made no criticism of this approach in similar circumstances where, after a referral of an application under s 63 had been made to the Registrar, orders were made splitting the application into two parts.[3]

[4] 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

[5] On 20 May 2021, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative of the State of South Australia (**State**) and enclosed a copy of the application, advising that any comment or information the State wished to provide should be received by 27 May 2021.

[6] Also on 20 May 2021, the senior officer wrote to the representative of the applicant to advise that any further information the applicant wished to provide should be received by 27 May 2021.

[7] I considered the information in the application and formed the view that it was appropriate for me to take into account the following documents which the applicant had provided to the Registrar for the purposes of registration testing of SAD6019/1998 Wirangu No 2 (SC1997/006) on 15 May 2020 (**additional material**):

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

(b) Affidavit of Elizabeth Poole, 9 October 2019 (**Claimant 1 affidavit**);

(c) Affidavit of Estelle Miller, 11 October 2019 (**Claimant 2 affidavit**);

(d) Affidavit of Hayden Davey, 11 October 2019 (**Claimant 3 affidavit**);

(e) Affidavit of Neville Miller, 10 October 2019 (**Claimant 4 affidavit**); and

(f) Affidavit of Wendy Ware, 10 October 2019 (**Claimant 5 affidavit**).

[8] On 2 June 2021, a senior officer of the Tribunal wrote to the State's representative to advise that I would be taking the additional material into account, and any comments from the State should be received by 9 June 2021.

[9] As mentioned above, on 3 June 2021, the Court made orders in relation to this application. Order 1 provided that the Commonwealth of Australia (**Commonwealth**) be joined as a party.[4] I formed the view that the Commonwealth should be given an opportunity to comment on the application and additional material before the registration decision was made. Therefore, on 11 June 2021, the senior officer wrote to the representative of the Commonwealth and provided a copy of the application and additional material and advised that any submissions or information should be received by 18 June 2021.

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[3] *Badimaya Barna Guda* [19].
[4] Order of O'Bryan J in *Wirangu Sea Claim No 2* (Federal Court of Australia, SAD84/2021, 3 June 2021).

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

Information considered

[11] In accordance with s 190A(3)(a), I have considered the information in the application. There is no information before me from searches of State, Territory or Commonwealth interest registers obtained by the Registrar under s 190A(3)(b). Neither the State nor the Commonwealth has supplied any information which I must consider in accordance with s 190A(3)(c).

[12] Section 190A(3) also provides that the Registrar may have regard to such other information considered appropriate. Pursuant to that provision, I have considered:

(a) the additional material, as described above;

(b) information contained in a geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 20 May 2021 (**geospatial report**);

(c) information in the Tribunal's geospatial database; and

(d) information on the Register.

Section 190C: conditions about procedures and other matters

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

[13] 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.[5] I have not addressed s 61(5) as I consider the matters covered by that provision are matters for the Court.

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

Section	Details	Form 1	Result
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

[15] 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

[5] *Doepel* [16], [35]–[39].

S 62(1)(d)	Section 47 agreements	Schedule L(2)	Met
s 62(2)(a)	Information about the boundaries of the area	Schedule B, Attachment B	Met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	Met
s 62(2)(c)	Searches	Schedule D	Met
s 62(2)(d)	Description of native title rights and interests	Schedule E	Met
s 62(2)(e)	Description of factual basis	Attachment F	Met
s 62(2)(f)	Activities	Schedule G, Attachment M	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met

Conclusion

[16] 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

[17] 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.

[18] The geospatial report states and my own searches confirm there are two applications which overlap the current application: Nauo #3 (SAD63/2018) and Mirning Eastern Sea and Land Claim (SAD76/2021). Both applications therefore meet s 190C(3)(a).

[19] My searches confirm there was no entry for either Nauo #3 or Mirning Eastern Sea and Land Claim on the Register when this application was made to the Court on 18 May 2021.[6] Therefore, neither application meets the requirements of s 190C(3)(b). As neither overlapping application can be considered a 'previous application' for the purposes of this condition, I do not need to consider whether there are members of the current application who are also members of the Nauo #3 or Mirning Eastern Sea and Land Claim native title claim groups.

Conclusion

[20] 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.

[6] *Strickland FC* [41]–[43].

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

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

(a) the application has been certified under Part 11 by each representative body that could certify the application; or

(b) the applicant is a member of the 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 claim group.

[22] Schedule R states the application is certified by South Australian Native Title Services Ltd (**SANTS**) and refers to Attachments R and R2. Attachment R contains a document titled 'Certification of Wirangu Sea Claim' (**certificate**). Attachment R2 contains an affidavit from a legal officer of SANTS. As the application is certified, I must consider whether the requirements of s 190C(4)(a) are met.

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

[23] 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?

[24] The certificate states it has been provided by SANTS. The geospatial report states that SANTS is the representative body for the whole of the application area. I have verified this information against current data in the Tribunal's national map 'Representative Aboriginal/Torres Strait Islander Body Areas'. That map shows SANTS as the body funded to perform the functions of a 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?

[25] 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. Paragraph 5 of the certificate states the application has been certified pursuant to s 203BE(1)(a). I am satisfied SANTS has the power to issue the certification. The certificate has been signed by two Directors of SANTS. I understand there is no impediment to the delegation of the certification function to particular individuals, acting either as a delegate or agent of the representative body.[8]

[7] *Doepel* [80]–[81].
[8] *Quall HCA* [48], [63].

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

[26] I note that amendments to s 203BE(4) were made on 25 March 2021, however these changes apply only to claims authorised after that date.[9] As the certificate provides that this claim was authorised on 31 October 2020, I will consider the certificate against the requirements of s 203BE(4) as they stood prior to 25 March 2021.

Section 203BE(4)(a) – statements

[27] 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. Section 203BE(2)(a)–(b) prohibits a representative body from certifying an application unless it is of the opinion that:

(a) all persons in the claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and

(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the claim group.

[28] As the certificate contains these required statements in paragraph 5, I am satisfied s 203BE(4)(a) is met.

Section 203BE(4)(b) – reasons

[29] 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. Paragraphs 6–9 of the certificate set out SANTS's reasons for its opinion, including:

(a) SANTS's work with the claim group over many years, including ethnographic research;

(b) SANTS's facilitation of a meeting of the claim group on 31 October 2020, following notification through newspaper notices and letters (**authorisation meeting**); and

(c) The unanimous resolution of the claim group at the authorisation meeting using an agreed and adopted decision-making process, to authorise the applicant to make the application.

[30] As the certificate sets out the reasons for SANTS's opinion that ss 203BE(2)(a)–(b) are met, I am satisfied s 203BE(4)(b) is met.

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

[31] 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). Section 203BE(3) states that if the application area is 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.

[9] *Native Title Amendment Act 2021* (Cth), s 24(2).

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

[32] As discussed above, this application is partially overlapped by the applications of Nauo #3 and Mirning Eastern Sea and Land Claim, so I consider this provision is applicable. The certificate does not set out what SANTS has done to meet the requirements of s 203BE(3), however, in accordance with that provision, I consider this failure does not invalidate the certification.

Conclusion

[33] As the certificate identifies the relevant representative body, the representative body has the power under Part 11 to issue the certification, and the certificate meets the mandatory requirements of s 203BE(4), the requirements of s 190C(4)(a) are satisfied. This means s 190C(4) is met.

Section 190B: merit conditions

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

[34] 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.

[35] I understand the questions for this condition are whether:

(a) the information and map provide certainty about the external boundary of the application area; and

(b) the information enables identification of any areas within the external boundary over which no claim is made.[10]

Does the information and map of the external boundary meet this condition?

[36] Schedule B refers to Attachment B which contains a description of the external boundary of the application area, with reference to a Commencement Point at Cape Bauer, surrounding native title determination applications and longitude and latitude coordinate points to six decimal places. The description specifies that the application area includes Flinders Island, East Waldegrave Island, West Waldegrave Island and The Watchers, and the waters surrounding those islands 300 metres seaward. The notes to the description specify that the coordinate points are referenced to the Geocentric Datum of Australia 2020 (**GDA2020**).

[37] Schedule C refers to Attachment C which contains a map titled 'Wirangu Sea Claim #2'. The map shows the external boundary of the application area with a bold blue outline and hatched fill. Inset maps show particular points in more detail, including the Waldegrave Islands and The Watchers. The Commencement Point at Cape Bauer is labelled and the map includes a coordinate grid. The notes to the map provide that the data source referenced is GDA2020.

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

[10] Section 62(2)(a)–(b); *Doepel* [122].

and map and am satisfied they provide certainty about the external boundary of the application area, sufficient for the purposes of this condition.

Does the information about excluded areas meet this condition?

[39] Schedule B describes the areas which are excluded from the application area in general terms, such as areas covered by previous exclusive possession acts and public works. With regard to these types of general exclusion clauses, I understand it is unrealistic to expect a concluded definition to be given in the application, as their applicability will require findings to be made as part of the hearing of the application.[11] Following this reasoning, I am satisfied the description of the areas covered by the general exclusion clauses in Schedule B will be sufficient to ascertain the excluded areas at the appropriate time.

Conclusion

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

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

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

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

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

[42] I understand that the requirements of s 190B(3) do not go beyond consideration of the terms of the application, which means I have limited my consideration to the information in the application.[12]

[43] Schedule A states:

> The Wirangu Sea Claim #2 Native Title Claim Group comprises those Aboriginal people who:
>
> (a) Are the biological descendants of the following ancestors: [list of apical ancestors].
>
> (b) Are identified and accepted as Wirangu people under traditional law and custom on the basis of descent from a Wirangu person; or
>
> (c) Are accepted by those listed at (a) as being adopted into the Wirangu people under traditional law and custom.

[44] It follows from the description that s 190B(3)(b) is applicable. I therefore 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.[13]

[11] *Strickland* [55].
[12] *Doepel* [16].
[13] *Wakaman* [34]; *Ward v Registrar* [25].

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

[45] The Court has previously held that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).[14] 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 pursuant to paragraph (a). I consider that factual enquiries would lead to the identification of the biological and adopted descendants of the named apical ancestors.

[46] Paragraph (b) indicates that the biological descendants of the apical ancestors must be accepted as such under traditional law and custom in order to be a member of the claim group. Paragraph (c) states the adopted descendants must also be accepted under traditional law and custom. In my view, acceptance by other claim group members introduces a subjective element to the claim group description. The Court has commented that '[a]s to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs' and that membership must be based on group acceptance, that being a necessary characteristic of a society.[15] I therefore consider that is through the application of the claim group's traditional laws and customs and enquiries to other claim group members that it could be ascertained whether any identified biological or adopted descendant is a member of the claim group.

Conclusion

[47] 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

[48] 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.[16] 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.

[49] I understand from paragraph 1 of Schedule E that exclusive possession is claimed in areas where it can be recognised. From paragraph 2 of Schedule E, I understand that in areas where exclusive possession cannot be recognised, three non-exclusive rights and interests are claimed. In my view, the claimed rights are understandable from the description.

[50] Paragraph 3 of Schedule E states that the native title rights claimed are exercisable in accordance with, and subject to, the traditional laws and customs of the claim group and laws

[14] *WA v NTR* [67].
[15] *Aplin* [256]–[261].
[16] *Doepel* [99].

of the State and the Commonwealth. In my view, the limitations on the claimed rights and interests are clear.

Conclusion

[51] 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

[52] 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 assertions that:

(a) the claim group have, and their predecessors had, an association with the area; and

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

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

[53] 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 the facts necessary to establish the claim.[17]

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

[54] Attachment F contains a summary of material prepared by anthropologists addressing the three limbs of s 190B(5). Schedule G provides a brief description of activities undertaken by the claim group in relation to the application area and refers to Attachment M, to which Schedule M also refers. Attachment M provides an outline of the physical connection that several claim group members have with the application area and an affidavit from a claim group member (**connection affidavit**).

[55] Attachment F refers to SAD6019/1998 Wirangu #2 (SC1997/006) (**Wirangu #2**) as the 'terrestrial native title claim' for the same claim group on whose behalf this claim has been made.[18] Using the Tribunal's geospatial database, I have confirmed that the application area is contiguous with the western seaward, external boundary of Wirangu #2. Apart from the land of Flinders, East Waldegrave and West Waldegrave Islands and The Watchers, the application area comprises waters which extend from the external boundary of Wirangu #2 to 300 metres into the sea.[19] In this circumstance, I consider it appropriate to have regard to the additional material the applicant provided to the Registrar in relation to the registration testing of Wirangu #2, specifically the Expert Report and the affidavits of Claimants 1–5, described above.

[17] *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].
[18] Attachment F, 1.
[19] Ibid, 3.

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

[56] 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;[20]

(b) there is 'an association between the whole group and the area', although not 'all members must have such association at all times';[21] 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'.[22]

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

[57] Attachment F provides that settlement in the application area occurred with the arrival of pastoralists in the 1840s–1850s.[23]

[58] Attachment F and the Expert Report provides the following information with regard to the association of the claim group prior to and at the time of settlement:

(a) In 1800-1801, explorer Matthew Flinders observed the bark huts and paths of the people living on the Eyre Peninsula, and 'heard their calls to each other';[24]

(b) In the 1840s, an eagle mythology was recorded in the region of the application area by one of the first European settlers;[25]

(c) In the 1850s–1860s, a ration depot was established at Venus Bay near the central part of the application area, where a number of Aboriginal people worked;[26]

(d) Also in the 1850s, exploitation of coastal resources by Aboriginal people, particularly of fish using intertidal rock pools was recorded in the western Eyre Peninsula region;[27]

(e) In 1861, approximately 200 Aboriginal people were recorded fishing with spears on the beach at Streaky Bay on the Eyre coast to the north of the application area;[28]

(f) In the 1870s, 'a strong Aboriginal presence' was recorded, including reports of people hunting and camping in the Mount Wedge, Elliston and Kyancutta areas near the southern end of the application area.[29] Wirangu burial practices were recorded in the Streaky Bay region to the north of the application area;[30]

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[20] *Gudjala 2007* [52].
[21] Ibid.
[22] *Martin* [26]; *Corunna* [39], [45].
[23] Attachment F, 4.
[24] Expert Report [166].
[25] Ibid [106].
[26] Ibid [56]–[59].
[27] Attachment F, 10.
[28] Ibid, 11.
[29] Expert Report [61].
[30] Ibid [118].

(g) Also in the 1870s, the Wirangu guide to explorer Ernest Giles identified and described the track of a mythological snake coming from the Musgrave Ranges in the north and travelling down to the sea;[31]

(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, and their language;[32]

(i) In the early 1900s, historical records describe trade routes running through the Eyre Peninsula to Ooldea soakage on the northern border of Wirangu territory;[33]

(j) In the 1910s and 1920s, Tindale recorded fishing practices in the Eyre Peninsula including night fishing with fires, and Bates recorded seasonal exploitation of seals and penguins;[34]

(k) 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 Eyre Peninsula.[35]

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

(a) Apical ancestor Kulbala 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;[36]

(b) Apical ancestor Eliza Ellen was born around 1840 at Streaky Bay. She had three children at Streaky Bay, born in 1859, 1860 and 1862 respectively;[37]

(c) Apical ancestor Binilya was born in 1855 and her 'run' was located inland from Streaky Bay. Binilya and Kaltnya's son is also remembered as being from Streaky Bay;[38]

(d) Apical ancestor Annie Wombat was recorded at Streaky Bay in 1935 and lived in and around the application area during the mid-twentieth century and is recalled by current claimants.[39]

[60] With regard to the intervening generations, the material before me provides:

(a) The 1935 census recorded Aboriginal people, including some of the apical ancestors and their descendants, living at locations throughout the area covered by the Wirangu #2 application, who were also observed fishing and digging for yams;[40]

(b) In the 1940s, Wirangu people, including some descendants of apical ancestor Annie Wombat, lived at various places along the Eyre Peninsula coast;[41]

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[31] Ibid [107].
[32] Ibid [33]–[36].
[33] Ibid [136], Attachment F, 12.
[34] Attachment F, 11–12.
[35] Expert Report [249]–[250].
[36] Ibid [369]–[370].
[37] Ibid [336]–[341].
[38] Ibid [328].
[39] Attachment F, 8; Claimant 5 affidavit [7].
[40] Expert Report [75]–[77].
[41] Ibid [78]–[79].

(c) In the 1960s, Wirangu families camped along the application area 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.[42]

[61] The material 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 Eyre Peninsula to a significant men's site near Port Kenny in the application area, and then south to the Marble Ranges;[43]

(b) The Wombat and Seal Dreaming, which travels through the Eyre Peninsula, has also been passed down to the current claim group from their predecessors, with significant locations connected to the story located in the application area near Baird Bay and Point Labatt;[44]

(c) Claim group members maintain a physical association with the application area through camping, fishing, swimming and diving at locations in and adjacent to the application area including Cape Finniss, Sceale Bay, Baird Bay, Venus Bay, Walkers Rock and Flinders Island;[45]

(d) Claim group members, their children, grandchildren and great grandchildren are 'doing what our forebears have always done' on the application area, including fishing with hand spears and with nets.[46]

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

[62] 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.[47] I note the comments in *Strickland*, that the requirements of the registration test are stringent and it is not necessary to elevate them to the impossible.[48] 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.[49] 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 that this application area comprises mostly of coastal and ocean waters and the factual basis material therefore speaks primarily to the adjacent areas of land, over which the same claim group has a registered native title claim.

[42] Ibid [299]–[300].
[43] Ibid [237]–[241].
[44] Ibid [247]–[249].
[45] Attachment M, 1–2, connection affidavit [19]–[65]; Claimant 4 affidavit [6].
[46] Connection affidavit [16], [19].
[47] *Martin* [25].
[48] *Strickland* [55].
[49] *Lane* [9].

Does the factual basis support an association between the predecessors of the claim group at sovereignty and since that time?

[63] Attachment F and the Expert Report summarise historical sources which support an association between the claim group and the application area since before the time of settlement. Information about the apical ancestors and their association to the application area and the surrounding region has been provided, examples of which I have summarised above. The information provides that the apical ancestors, the oldest of whom was born in the 1830s, had an association with the application area around 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 own predecessors, who would have been alive prior to British sovereignty. I understand that it is appropriate to make this retrospective inference and to construe the Native Title Act beneficially.[50]

[64] The material provides that members of the intervening generations of the claim group lived at various locations adjacent or nearby to the waters of the application area and continued to hunt, fish and forage there, and knew the Dreaming stories attached to the land and seascape. In my view, the material demonstrates that the generations between the apical ancestors and the current claim group sustained their association with the application area. I am therefore satisfied that the factual basis supports an association between the predecessors of the claim group at the time of sovereignty and since that time.

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

[65] 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 from the material, some of which I have extracted above, of claim group members continuing to access the application area to camp and fish. I also note the information in Attachment M about claim group members diving and swimming in the waters of the application area. There is also 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 places in the application area, such as the Wombat and Seal Dreaming, told to them by their predecessors and documented in the historical record.

Does the factual basis support an association, both past and present, with the <u>whole</u> area claimed?

[66] 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'.[51] 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 utilising places throughout and around the application area. There is also information to support an ongoing spiritual association with the application area,

[50] *Harrington-Smith No 5* [294]–[296], *Kanak* [73].
[51] *Corunna* [31].

demonstrated through the knowledge passed down through the generations since the time of settlement about Dreaming stories which traverse the length of the application area.

Conclusion – s 190B(5)(a)

[67] 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)?

[68] 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] '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.[52]

[70] 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.[53]

[71] 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.[54]

[72] 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

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[52] *Gudjala 2007* [26], [62]–[66], which was not criticised by Full Court on appeal in *Gudjala 2008*.
[53] *Yorta Yorta* [46]–[47], emphasis added.
[54] *Warrie* [105], [107], emphasis added.

those ancestors and the pre-sovereignty society from which the laws and customs of the claim group are derived.[55]

[73] 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'.

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

[74] In addition to the information summarised at s 190B(5)(a) above, Attachment F and the Expert Report assert that application area belonged to a pre-sovereignty society which was identifiable through shared spiritual beliefs, rules of social organisation and recognition of inheritance of rights to land by descent.[56] The material provides that the pre-sovereignty society, at its widest, formed a 'culture bloc' comprising the Wirangu, their neighbours to the east, being the Nauo and Barngarla people, and possibly the Mirning people to the west.[57] As discussed above at s 190B(5)(a), the material states that the people in this society were also linked through trade routes which saw the bartering of goods from the application area.[58]

[75] According to the material, in the 1850s the exclusive nature of the descent-based 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.[59] In the 1920s, Tindale recorded camping areas utilised only by particular Wirangu families or groups.[60] 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.[61]

[76] As discussed above at s 190B(5)(a), the mythologies recorded in and around 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 material provides that these mythologies provide normative behaviours which the claim group observed at the time of settlement and continue to observe.[62] For example, in the 1930s senior Wirangu informants stated that the mythological snake's territory, which included caves and blowholes along the Eyre Peninsula coast, was to be avoided.[63] Apical ancestor Kwana, who was born in 1894, learnt the snake mythology and associated rules from people his parents' and grandparents' generation, whose knowledge 'stretched back to the period prior to the first settlements'.[64] The Eagle Dreaming contains a story of a mythical ancestor 'who was speared for marrying the

[55] *Gudjala 2009* [40].
[56] Expert Report [92]–[98], [144], [149]; Attachment F, 10.
[57] Expert Report [99]–[100], [210]; Attachment F, 13.
[58] Expert Report [135]–[138]; Attachment F, 12.
[59] Expert Report [124]; Attachment F, 10.
[60] Ibid [158].
[61] Ibid [265], [268].
[62] Attachment F, 13.
[63] Expert Report [109]–[110].
[64] Ibid [109].

wrong woman'.[65] A men's site associated with the Eagle Dreaming is avoided by women who continue to be taught to not 'look that way' when in the area.[66] Claimants recall that going to the wrong place as children resulted in punishment by the Elders, with one claimant stating '[t]here was always somebody watching to make sure you did things properly'.[67]

[77] 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'.[68] The historical record reveals the Wirangu people used specialist techniques including torch lit fishing and particular fish traps.[69] 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.[70] Another states that her family 'has always harvested from the foreshores in Wirangu country' and she has taught her children these skills and the 'traditional rule' for collecting food in moderation.[71]

[78] Wirangu burial practices were first recorded in the 1870s and later by Elkin in the 1930s in the Streaky Bay region.[72] Current claimants have been taught the location of burial sites in the application area by their predecessors, and state they have to 'be careful digging around the sand dune though because the old people would often bury their dead in the dunes'.[73]

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?

[79] I consider that there is sufficient information in the material before me 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 before me, I understand that only a few generations separate the apical ancestors from the current claim group who are their descendants, and that those ancestors who were alive in the early decades of 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.[74]

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[65] Ibid [244].
[66] Ibid [241].
[67] Ibid [301], [442]; Claimant 2 affidavit [16].
[68] Expert Report [250]–[251].
[69] Ibid [197].
[70] Ibid [292]–[293].
[71] Claimant 1 affidavit [8], [11].
[72] Expert Report [118].
[73] Ibid [228]–[231], Claimant 4 affidavit [21].
[74] *Gudjala 2009* [40].

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

[80] 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.[75] As summarised above, laws pertaining to the inheritance of rights were recorded throughout the historical period and continue to be observed today. The material provides that the predecessors alive in the early settlement period learnt these laws from their own predecessors, some of whom would have been alive prior to sovereignty. 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. I consider these examples and others in the material before me 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 teaching, oral transmission and common practice.

Conclusion – s 190B(5)(b)

[81] 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)?

[82] 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.[76] 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.[77]

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

[83] With regard to the continuity of the claim group's traditional laws and customs, Attachment F provides that the transmission still occurs through different opportunities and circumstances, such as cultural education tours within the application area taught by Wirangu Elders to younger Wirangu people.[78] There are also examples found in the claimants' affidavits. For example, the connection affidavit describes the deponent's use and knowledge of the application area and that of his family and other Wirangu people, including particular fishing methods and skills to keep safe from sharks.[79] Claimant 4 describes how his great grandmother

[75] *Yorta Yorta* [46]–[47].
[76] *Gudjala 2009* [29].
[77] *Gudjala 2007* [82].
[78] Attachment F, 14.
[79] Connection affidavit, [16]–[23].

hunted and camped at Streaky Bay and 'all along that coast line… just like we have'.[80] Claimant 2 states, 'Mum would talk a lot about the different foods we could find so my kids learnt from her like I did'.[81]

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

[84] 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 teaching, 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. 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.[82]

Conclusion – s 190B(5)(c)

[85] 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

[86] 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.

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

[87] 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.

[88] Section 190B(6) requires some measure of the material available in support of the claim and appears to impose a more onerous test to be applied to the individual rights and interests claimed.[83] I understand 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'.[84]

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[80] Claimant 4 affidavit [16].
[81] Claimant 2 affidavit [18].
[82] *Gudjala 2009* [31].
[83] *Doepel* [126]; [132].
[84] Ibid [135].

[89] 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?

(1) In the areas where exclusive possession can be recognised, the native title rights and interests possessed under traditional laws and customs are the rights of possession, occupation, use and enjoyment as against the whole world.

[90] In *Ward HC*, the majority commented 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*'.[85]

[91] In *Griffiths FC* the Full Court observed:

> [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*.[86]

[92] *Griffiths FC* held 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.[87] 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 application area.

[93] 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.[88] 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.[89]

[94] 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

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[85] *Ward HC* [93], emphasis added.
[86] *Griffiths FC* [127], emphasis added.
[87] Ibid [71].
[88] Expert Report [319]–[320].
[89] Ibid [126].

enable safe access to country and permit use of its resources.[90] Through observance of the appropriate protocols, the claim group can exercise control over others' access to the application area and prevent the resident spirits, including those in the sand hills of Sceale Bay in the application area, from causing harm or being harmed.[91] 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 for it.[92]

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

[96] I therefore consider this right is prima facie established.

2. In the areas where non-exclusive rights and interests may be recognised, the native title rights and interests of the members of the Wirangu native title claim group are the rights to:

a. access, remain on and use the areas;

b. access and to take for any purpose the resources of the areas;

[97] At s 190B(5) above, I have extracted examples of claim group members, past and present, accessing the application area for activities including camping, hunting, fishing and extracting resources for food.[93] I have also noted above the historical information which supports the existence of a trade network through which resources were traded out of the application area using a barter system.[94] The Expert Report also provides that predecessors of the claim group traded mallee fowl eggs with settlers for flour.[95] Today, working in Indigenous heritage and cultural education provide opportunities for current claimants to access the application area and its resources.[96] A particular example in relation the application area is found in the affidavit of Claimant 1, who describes how she was taught particular methods for harvesting marine resources from her mother that she has taught to her descendants, stating:

> You can get cockles down at Bairds Bay - you go into the water at low tide and do the "cockle shuffle" with your feet in the sand, then you pick them up and take them back. … From when I was young, I would collect shells off the beach so we could eat and also, I loved the shells. This is just what I have done with my children and grandchildren from when they were young.[97]

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

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[90] Ibid [311]–[313].
[91] Ibid [228]–[231].
[92] Ibid [232].
[93] See for example, Expert Report [455].
[94] Ibid [135]–[138], Attachment F, 12.
[95] Expert Report [128].
[96] Ibid [497], Attachment F, 14.
[97] Claimant 1 affidavit [10], [12], [13], [18].

c. protect places, areas and things of traditional significance on the areas

[99] 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'.[98] In addition to speaking to the spirits which inhabit the land and seascapes, I understand the claimants now exercise this right by participating in the management of national parks and heritage protection surveys.[99]

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

Conclusion

[101] I am satisfied the application contains sufficient information about all 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 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

[102] 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 application area; or

(b) previously had and would reasonably have been expected currently to have such a connection but for things certain things done, such as acts by the Crown, statutory authorities or lease holders.

[103] 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.[100]

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?

[104] 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 and using its resources for food, supports the existence of a physical connection. Additionally, the information in Attachment M, including the connection affidavit, provides detailed information about particular claim group members' ongoing connection to places in the application area and their use of it for activities including camping, fishing, swimming and diving.

[98] Expert Report [232].
[99] Ibid [478]–[479], Attachment F, 14.
[100] *Doepel* [18], *Gudjala 2009* [84].

[105] 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

[106] I am 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

[107] Section 190B(8) requires the application to comply with ss 61A(1)–(3):

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	Paragraph 1 of Schedule B provides that land and waters covered by previous exclusive possession acts are 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	Paragraph 3 of Schedule B states exclusive possession is not claimed over areas subject to valid previous non-exclusive possession acts	Met

Conclusion

[108] As the application meets the requirements of ss 61A(1)–(3), s 190B(8) is met.

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

[109] 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.

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 claim group 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	Paragraph 1 of Schedule E and Schedule P state the claim group 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	Paragraph 6 of Schedule B states that land and waters where native title have been extinguished are excluded from the application	Met

Conclusion

[110] As the application meets the requirements of ss 190B(9)(a)–(c), s 190B(9) is met.

End of reasons

Attachment A

Summary of registration test result

Application name	Neville Bilney & Ors and the State of South Australia (Wirangu Sea Claim #2)
NNTT No.	SC2021/003
Federal Court of Australia No.	SAD84/2021
Date of decision	25 June 2021

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: 18 May 2021

Date application entered on Register: 25 June 2021

Applicant: As per Schedule of Native Title Applications (**Schedule**)

Applicant's address for service: As per Schedule

Application Area: As per Schedule

Area covered by claim (as detailed in the application): As per Schedule

Persons claiming to hold native title: As per Schedule

Registered native title rights and interests: As per Schedule

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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 19 May 2021 and made pursuant to s 99 of the Native Title Act.

25 June 2021