

## Registration Decision

<b>Application name</b>	Brenton Weetra and Ors and the State of South Australia (Nauo #4 Native Title Claim) ( <b>Nauo #4</b> )
<b>Name of applicant</b>	Brenton Weetra, Pauline Branson, Cynthia Weetra-Buzza and Jody Miller
<b>Federal Court of Australia No.</b>	SAD185/2021
<b>NNTT No.</b>	SC2021/004
<b>Date of Decision</b>	28 January 2022

### **Claim not accepted for registration**

I have decided the claim in the Nauo #4 application does not satisfy all the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).<sup>1</sup> Therefore the claim must not be accepted for registration and will not be entered on the Register of Native Title Claims (**Register**).

For the purposes of s 190D(3), my opinion is that the claim satisfies all the conditions in s 190B. However it does not satisfy ss 190C(2)–(4).

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Katy Woods<sup>2</sup>

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<sup>1</sup> All legislative references are to the *Native Title Act 1993* (Cth) (**Native Title Act**), unless stated otherwise.

<sup>2</sup> 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*.

## Reasons for Decision

### Cases Cited

*Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 (**Aplin**)  
*Bell v Native Title Registrar* [2021] FCA 229 (**Bell**)  
*Corunna v Native Title Registrar* [2013] FCA 372 (**Corunna**)  
*De Rose v South Australia* [2002] FCA 1342 (**De Rose**)  
*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] 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 Western Australia (No 5)* [2003] FCA 218 (**Harrington-Smith No 5**)  
*Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (**Harrington-Smith No 9**)  
*Helicopter Tjungarrayi on behalf of the Ngurra Kayanta People v State of Western Australia (No 3)* [2017] FCA 938 (**Tjungarrayi 2017**)  
*Kanak v National Native Title Tribunal* [1995] FCA 1624 (**Kanak**)  
*Martin v Native Title Registrar* [2001] FCA 16 (**Martin**)  
*McLennan v State of Queensland* [2019] FCA 1969 (**McLennan**)  
*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**)  
*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 Strickland* [2000] FCA 652 (**Strickland FC**)

### Background

- [1] The claim in this application is made on behalf of the Nauo native title claim group (**claim group**). It covers 27 individual parcels of land totalling approximately 7.36 square kilometres, located along the west coast of the Eyre Peninsula in South Australia (**application area**).
- [2] The application was filed on 15 October 2021 and the Federal Court of Australia (**Federal Court**) gave a copy of the application to the Native Title Registrar (**Registrar**) pursuant to s 63. This referral triggered the Registrar's duty to consider the claim made in the application in accordance with s 190A. In accordance with s 190A(6), I must accept the claim for registration if it satisfies all the conditions in ss 190B–190C (**registration test**).
- [3] For the reasons set out below, I consider that the claim in the application does not satisfy all the conditions of the registration test and therefore it must not be accepted for registration. Attachment A contains a summary of my decision.

## Procedural fairness

- [4] On 22 October 2021, a senior officer of the National Native Title Tribunal (**Tribunal**) wrote to the representative of the State of South Australia (**State**) to advise I would be applying the registration test to the application and any comments on the application should be received by 5 November 2021.
- [5] Also on 22 October 2021, the senior officer wrote to the applicant's representative and advised that any further information the applicant wished me to consider should be received by 5 November 2021.
- [6] On 25 October 2021, the State's representative advised that the State did not intend to make any submissions in relation to the application of the registration test.
- [7] I considered the application and formed the preliminary view that the claim in the application was unlikely to pass all the conditions of the registration test. Therefore, on 9 December 2021, the senior officer wrote to the applicant's representative and provided my preliminary assessment of the claim, advising that any response or further information should be received by 17 December 2021.
- [8] No further information or response was received from the applicant and so this concluded the procedural fairness process.

## Information considered

- [9] 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). There is no information before me from the State which I must consider in accordance with s 190A(3)(c). Section 190A(3) also provides that the Registrar may have regard to such other information considered appropriate. Pursuant to that provision, I have considered information in the geospatial assessment and overlap analysis of the application area prepared by the Tribunal's Geospatial Services dated 28 October 2021 (**geospatial report**), information in the Tribunal's geospatial database and information on the Register.

## Section 190C: conditions about procedures and other matters

### **Information etc. required by ss 61–2 – s 190C(2): condition not met**

#### What is required to meet s 190C(2)?

- [10] 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.<sup>3</sup> I understand the matters covered by s 61(5) are matters for the Federal Court.

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<sup>3</sup> *Doepel* [16], [35]–[39].

## Consideration

[11] I consider the application contains the details specified in s 61:

Section	Details	Information	Result
s 61(1)	Native title claim group have authorised the applicant	Part A(2), Schedule A, affidavits in Attachment A (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

[12] I consider the application does not contain all the information specified in s 62:

Section	Details	Information	Result
s 62(1)(a)	Affidavits in prescribed form	s 62 affidavits	Not met – see reasons below
s 62(1)(d)	Section 47 agreements	-	Met – see reasons below
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	Attachment F	Met
s 62(2)(f)	Activities	Schedule G	Met
s 62(2)(g)	Other applications	Schedule H	Met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	Met
s 62(2)(h)	Notices under s 29	Schedule I	Met
s 62(2)(i)	Conditions on authority	Attachment R	Met

### **Section 62(1)(a)**

[13] Section 62(1)(a) states that the application must be accompanied by an affidavit sworn by the applicant stating the matters mentioned in s 62(1A), in summary:

- (a) that the applicant believes that the native title rights and interests claimed by the claim group have not been extinguished in relation to any part of the application area, and
- (b) that the applicant believes that none of the application area is also covered by an approved determination of native title; and
- (c) that the applicant believes that all of the statements made in the application are true; and
- (d) that the applicant is authorised by all the persons in the claim group to make the application and to deal with matters arising in relation to it; and
- (e) the details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it; and
- (f) if there are no conditions under section 251BA on the authority that relate to the making of the application—that there are no such conditions; and
- (g) if there are any conditions under section 251BA on the authority that relate to the making of the application:
  - (i) that the conditions have been satisfied; and

(ii) how the conditions have been satisfied.

[14] Amendments to the Native Title Act came into effect on 25 March 2021.<sup>4</sup> Item 24 of the Replacement Revised Explanatory Memorandum to the Native Title Legislation Amendment Bill 2020 (**Explanatory Memorandum**) provides:

... The effect of this item is that where a claim group authorises an applicant or an ILUA under sections 251A or 251B prior to the commencement of this item on Proclamation, the current registration provisions for the claim or agreement would continue to apply to that agreement or claim, even after the item commences. **Where the authorisation of an applicant does not occur until after the commencement of this item, the new provisions would apply** (provided the relevant claimant or compensation application, or native title agreement occurs after commencement).<sup>5</sup>

[15] The certificate from South Australian Native Title Services Ltd (**SANTS**) in Attachment R states that the applicant was authorised to make this application at a meeting of the claim group held on 15 July 2021. As the applicant was authorised after 25 March 2021, I understand from the Explanatory Memorandum that the application must be assessed against the Native Title Act as amended.

[16] Section 62 is one of the provisions affected by the 25 March 2021 amendments. The newly introduced s 62(1A) requires the s 62 affidavits to either state that there are no conditions on the applicant's authority (s 62(1A)(f)), or, if there are conditions on the applicant's authority, state that those conditions have been satisfied and how they have been satisfied (s 62(1A)(g)). I have examined the s 62 affidavits and I consider that they do not contain any statements addressing the requirements of either s 62(1A)(f) or s 62(1A)(g).

[17] I also consider that the s 62 affidavits do not include the statement specified in s 62(1A)(a), that the applicant believes that the native title rights and interests claimed have not been extinguished in relation to any part of the application area.

[18] In my view, as the s 62 affidavits do not state all the matters mentioned in s 62(1A), the application does not contain all the information required by s 62.

### **Section 62(1)(d)**

[19] Section 62(1)(d) states that, if the operation of s 47C has been agreed to in writing in accordance with s 47C(1)(b) or s 47C(5) in relation to all or part of the application area, then the application must be accompanied by a copy of the relevant agreement. As no s 47 agreement accompanies the application, I understand that no such agreement has been agreed to.

## **Conclusion**

[20] As the application does not contain all the details and information specified in ss 61–2, I am not satisfied s 190C(2) is met.

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<sup>4</sup> *Native Title Legislation Amendment Act 2021* (Cth).

<sup>5</sup> *Ibid*, Schedule 1, Part 1, item 24(2), emphasis added.

## No previous overlapping claim group – s 190C(3): condition not met

### What is required to meet s 190C(3)?

- [21] 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.

### Consideration

- [22] Schedule H states ‘there are no concurrent native title claimant applications in relation to any of the parcels listed in Schedule B’. Schedule B contains a written description of the 27 parcels which comprise the application area with reference to their DCBID number, Hundred name and title reference. I also note that the applicant claims the benefit of s 47B in Schedule L, which provides for any prior extinguishment of native title in Vacant Crown land to be disregarded.
- [23] The geospatial report advises that the application area is entirely overlapped by the application of SAD6021/1998 Nauo Native Title Claim (SC1997/008) (**Nauo**). I have examined the information about the Nauo application held on the Register and note that the description of the Nauo application area does not appear to exclude Vacant Crown land areas affected by the operation of s 47B. I am therefore satisfied that the Nauo application does overlap the current application. This means s 190C(3)(a) is met.
- [24] *Strickland FC* provides that, for the purposes of s 190C(3)(b), the date an application was ‘made’ is the date it was filed in the Federal Court.<sup>6</sup> According to the Register, the Nauo application was on the Register when this application was filed in the Federal Court on 15 October 2021. The Nauo application therefore satisfies s 190C(3)(b).
- [25] The Register also shows that the entry for the Nauo application was made as a result of it being considered for registration under s 190A, and it has not been removed. The Nauo application therefore satisfies s 190C(3)(c).
- [26] In my view, as the Nauo application satisfies all the conditions in ss 190C(3)(a)–(c), it is a ‘previous application’ and so consideration must be given to whether there are members of the Nauo native title claim group who are also members of the claim group for the current Nauo #4 application.
- [27] I have compared the description of the native title claim group for the Nauo application with the claim group description in Schedule A of the current application and I note the following similarities:

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<sup>6</sup> *Strickland FC* [41]–[44].

- (a) The Nauo claim group description includes the descendants of apical ancestor ‘Mary, a Nauo woman born c. 1840s and who was the mother of Henry Weetra...’;
- (b) The claim group description in the current application includes the descendants of apical ancestor ‘**Mary** mother of Henry Weetra’;
- (c) The Nauo claim group description includes the following apical ancestor and information about his descendants:

13. Cecil Spencer Weetra born 1910 is acknowledged as an apical ancestor of the Nauo Native Title claim. Cecil and his spouse had 8 children. His biological descendants are acknowledged as part of the Nauo Native Title claim group and include the families of Anderson, Heron, Warrior and Weetra.

- (d) The claim group description in the current application includes the descendants of ‘Mother of **Elizabeth Anderson**’.<sup>7</sup>

[28] In my view, the above information indicates that there is at least one ancestor common to both applications, specifically Mary, the mother of Henry Weetra. I also consider that the information shows that the members of the Anderson family likely belong to both native title claim groups.

## Conclusion

[29] I am not 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 not met.

## Identity of claimed native title holders – s 190C(4): condition not met

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

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

- (a) the application has been certified under Part 11 by each representative body that could certify the application in performing its functions under that Part; or
- (b) the requirements of s 190C(4AA) are met.

[31] As noted above at s 190C(2), Attachment R contains a certificate from SANTS. As a certificate accompanies the application, I understand I must assess the application against the requirements of s 190C(4)(a), and 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).<sup>8</sup>

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<sup>7</sup> Original emphasis.

<sup>8</sup> *Doepel* [80]–[81].

## Consideration

### ***Is the relevant representative body identified?***

[32] The geospatial report states and my own searches of the Tribunal's geospatial database confirm that SANTS is the representative body for the whole of the application area. I am therefore satisfied the certificate identifies the relevant representative body.

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

[33] The certificate states that SANTS performs the functions of a representative body pursuant to s 203FE(1). SANTS can therefore perform all the functions listed in Part 11 of the Native Title Act, including the certification functions in s 203BE. I am satisfied SANTS has the power under Part 11 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.<sup>9</sup>

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

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

#### *Section 203BE(4)(a) – statements*

[35] Section 203BE(4)(a) requires a representative body to state that it is of the opinion that the requirements of s 203BE(2) have been met. Section 203BE(2) 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;
- (aa) any conditions under s 251BA on the authority that relate to the making of the application have been satisfied; 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.

[36] Statements addressing s 203BE(2)(a) and s 203BE(2)(b) appear in paragraph 5 of the certificate. Paragraph 8 sets out the conditions placed on the applicant's authority to make the application. I have examined the certificate and I am satisfied that it does not contain a statement to show that in SANTS's opinion, the conditions placed on the authority of the applicant have been satisfied, as required by s 203BE(2)(aa). In my view, the omission of this statement means the requirements of s 203BE(4)(a) are not met.

#### *Section 203BE(4)(b) – reasons*

[37] Section 203BE(4)(b) requires a representative body to briefly set out its reasons for being of the opinion that the requirements of s 203BE(2) have been met. Paragraph 6 of the certificate sets out SANTS's reasons for being of the opinion that s 203BE(2)(a) and s 203BE(2)(b) are satisfied, referring to SANTS's extensive work with the claim group over many years and the facilitation of an authorisation meeting held on 15 July 2021 at Port Lincoln.

[38] As discussed above, the certificate does not contain a statement from SANTS that it is of the opinion that the conditions placed on the applicant's authority have been satisfied. Similarly,

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<sup>9</sup> *Quall HCA* [48], [63].



the certificate does not contain SANTS's reasons for being of the opinion that the requirements of s 203BE(2)(aa) are satisfied. Without such information, I consider that the requirements of s 203BE(4)(b) are not met.

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

[39] 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 other applications of which the representative body is aware, it must make all reasonable efforts to achieve agreement between the persons in respect of whom the applications are made and minimise the number of overlapping applications.

[40] As discussed above, the application is wholly overlapped by the Nauo application. I therefore consider that s 203BE(4)(c) is applicable. I have examined the certificate and I am satisfied it does not contain a statement addressing the requirements of s 203BE(3). However I note that s 203BE(3) also provides that a failure by the representative body to comply with this provision does not invalidate the certificate.

#### Conclusion

[41] The certificate identifies the relevant representative body and the representative body has the power under Part 11 to issue the certification. However as the certificate does not meet all the requirements of s 203BE(4), s 190C(4)(a) is not satisfied. This means s 190C(4) is not met.

#### Section 190B: conditions about merits of the claim

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

#### What is required to meet s 190B(2)?

[42] 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.

[43] 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.<sup>10</sup>

#### Consideration

[44] As discussed above at s 190C(3), the 27 parcels which comprise the application area are described in paragraph (a) of Schedule B with reference to their respective DCDBID number, Hundred name and title reference.

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

[45] Attachment C contains a map titled 'Nauo 4' which depicts the external boundary of the application area with a bold blue outline. On the map, the parcels are labelled by their DCDBID numbers.

[46] 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 information in Schedule B and the map in Attachment C and I consider they provide certainty about the external boundary of the application area.

***Does the information about excluded areas meet this condition?***

[47] Paragraph (b) of Schedule B states 'There are no areas within those boundaries that are not covered by the application'. I understand from this information that no areas are excluded from the application.

**Conclusion**

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

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

**What is required to meet s 190B(3)?**

[49] 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.

[50] Schedule A states:

Under the traditional laws and customs of the Nauo People they comprise a group of those Aboriginal people, who hold in common the traditional laws and customs that are associated with Nauo Country because of their:

- (a) descent from a Nauo apical ancestor; or
- (b) affiliation with Nauo Country through a parent or grandparent; or
- (c) birth on or near Nauo Country;

AND

- (d) long-term association with Nauo Country;
- (e) traditional geographic and spiritual knowledge of the Country;
- (f) identification as a Nauo person; and
- (g) identification as a Nauo person by other members of the claim group.

AND

A person is considered to be descended from a Nauo apical ancestor where that person is 'raised up' by a biologically descended Nauo Person. 'Raising up' includes assuming the responsibilities of a parent and guardian and raising the person in the traditions of Nauo law and culture.

Under Nauo traditional laws and customs, Nauo People are related by means of a traditional principle of descent to the following apical ancestors:

**Mary** mother of Henry Weetra

**Topsy Ahang**

Mother of **Elizabeth Anderson**

**Frederick Milera**<sup>11</sup>

[51] It follows from the description that s 190B(3)(b) is applicable. I understand I am not required to do more than make an assessment of the sufficiency of the description for the purpose of facilitating the identification of any person as part of the group.<sup>12</sup> My consideration at this condition is limited to information in the application.<sup>13</sup> I understand that where a claim group description contains a number of paragraphs, they should be read as one discrete passage and in such a way as to secure consistency between them, if such an approach is reasonably open.<sup>14</sup> I also understand that it is appropriate to construe the requirements of the Native Title Act beneficially.<sup>15</sup> I have followed this judicial guidance in my reasons below.

## Consideration

[52] From the description in Schedule A, I understand that to qualify for membership of the claim group, an individual must meet one of the criteria in paragraphs (a)–(c). That is, they must be a descendant of one of the named ancestors, be affiliated with Nauo country through a parent or grandparent, or have been born on or near Nauo country. With regard to descent from the named ancestors, I understand from the description that this includes descent by adoption or ‘raising up’.

[53] I also understand from the description that the individuals who meet one of the criteria in paragraphs (a)–(c) must also meet all of the criteria in paragraphs (d)–(g) in order to be considered a member of the claim group. That is, they must have a long term association with Nauo Country, traditional knowledge of Country, self-identify as a Nauo person and be identified as a Nauo person by other members of the claim group.

[54] I will consider each of the elements of the claim group description in turn below.

### **Descent**

[55] *WA v NTR* provides that describing a claim group with reference to descent from named ancestors, including by adoption, satisfies the requirements of s 190B(3)(b).<sup>16</sup> I consider that requiring a person to show descent from an identified ancestor provides an objective starting point to commence an inquiry about whether a person is a member of the claim group. I

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<sup>11</sup> Original emphasis.

<sup>12</sup> *Wakaman* [34].

<sup>13</sup> *Doepel* [16].

<sup>14</sup> *Gudjala 2007* [34].

<sup>15</sup> *Kanak* [73].

<sup>16</sup> *WA v NTR* [67].

consider that factual enquiries would lead to the identification of the people who meet this criterion.

### **Affiliation**

[56] I note the reference to the traditional laws and customs of the claim group in the opening sentence of Schedule A and I consider the traditional laws and customs would provide the appropriate set of rules or principles through which it can be ascertained whether a person meets this criterion.<sup>17</sup> *Aplin* provides that '[a]s to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs'.<sup>18</sup> I therefore consider that enquiries to the individual in question and the other members of the claim group, would reveal whether a person is affiliated with Nauo country through a parent or grandparent, in accordance with the traditional laws and customs.

### **Birthplace**

[57] Describing a claim group with reference to birthplace is a method which has previously been accepted.<sup>19</sup> In my view, some factual enquiry it will be possible to identify the persons who meet this option for claim group membership.

### **Long association**

[58] Describing a claim group with reference to long traditional association has also previously been accepted.<sup>20</sup> I consider that enquiries to the person in question and to the other claim group members would enable the persons who satisfy the 'long association' criterion, in accordance with the claim group's traditional laws and customs, to be ascertained.

### **Traditional knowledge**

[59] Traditional geographical and religious knowledge of an area has also previously been accepted as a means of describing claim group membership.<sup>21</sup> As with the 'long association' criterion, I consider that enquiries to the person in question and the other claim group members would enable the persons who satisfy this criterion to be ascertained.

### **Self-identification**

[60] I understand that self-identification can be ascertained either by assertion, or by virtue of the way in which an individual conducts themselves and that this criterion introduces a subjective element to the claim group description.<sup>22</sup> I consider that enquiries to the individuals in question would reveal whether they self-identify as a Nauo person.

### **Identification**

[61] *Aplin* provides that membership of a claim group is based on group acceptance and I consider this criterion also contains a subjective element.<sup>23</sup> I understand from information in Attachment F that the claim group have an association with the application area and that their

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<sup>17</sup> *Ward v Registrar* [25].

<sup>18</sup> *Aplin* [256].

<sup>19</sup> *De Rose* [926].

<sup>20</sup> *Ibid* [897], *Tjungarrayi 2017*, Schedule 3; *WA v NTR* [67].

<sup>21</sup> *De Rose* [897].

<sup>22</sup> *Aplin* [226].

<sup>23</sup> *Ibid* [256]–[261].

traditional laws and customs give rise to native title rights and interests.<sup>24</sup> I therefore understand that this association with the land enables other members of the claim group to identify whether a person is a member of the claim group. In my view, through enquiries to the other members of the claim group, it would be possible to ascertain whether a person is identified and accepted as a member under the traditional laws and customs.

## Conclusion

[62] 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

### What is required to meet s 190B(4)?

[63] 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. My consideration of s 190B(4) is confined to information found in the application.<sup>25</sup> I have not considered at this condition 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 each of the claimed rights is established as a native title right on a prima facie basis.

## Consideration

[64] From Schedule E, I understand that nine non-exclusive rights are claimed in relation to the application area. Schedule E also provides that the claimed rights and interests are subject to the laws of the State of South Australia and the Commonwealth, and the rights conferred upon persons pursuant to those laws. In my view, having considered the information in Schedule E, I consider the nature, extent and limitations on the claimed rights are clear and there is no inherent or explicit contradiction within the description.<sup>26</sup>

## Conclusion

[65] 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

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

[66] To meet s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. In particular, the factual basis must support the following assertions:

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

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<sup>24</sup> Weetra statement [11]–[29], [37], for example.

<sup>25</sup> *Doepel* [16].

<sup>26</sup> *Ibid* [123].

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

[67] I understand my task is limited to assessing whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determining whether there is evidence that proves directly or by inference the facts necessary to establish the claim.<sup>27</sup> I am not required by s 190B(5) to determine whether the asserted facts will or may be proved at a hearing.<sup>28</sup>

## Consideration

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

[68] As discussed above, Schedule E describes the native title rights and interests claimed by the claim group in the application area. Schedule G lists activities currently undertaken by the claim group in relation to the application area. Schedule F and Schedule M refer to Attachment F, which contains a document titled ‘Comments on Nauo Rights and Interests’ (**Rights and Interests paper**). Attachment F also contains statements from the following claim group members, which appear to have been filed in the Nauo proceedings and also made in support of the application of SAD63/2018 Brenton Weetra and Ors on behalf of the Nauo #3 Native Title Claim and the State of South Australia and Ors (SC2018/001) (**Nauo #3**):

- (a) Brenton Weetra, undated (**Weetra statement**);
- (b) Cynthia Weetra Buzza, 3 September 2020 (**Buzza statement**);
- (c) Danielle Ahang, 3 September 2020 (**Ahang statement**);
- (d) David Buzza, 3 September 2020 (**David Buzza statement**);
- (e) Jason Ramp, 3 September 2020 (**Ramp statement**);
- (f) Joanne Ethel “Girlie” Miller, 3 September 2020 (**Miller statement**);
- (g) Jody Joseph Miller, 3 September 2020 (**Jody Miller statement**);
- (h) John Leonard Byron Snr, 3 September 2020 (**Byron statement**);
- (i) Mark Larking, 3 September 2020 (**Larking statement**);
- (j) Michael James Miller, 3 September 2020 (**Michael Miller statement**);
- (k) Pauline Branson, 3 September 2020 (**Branson statement**);
- (l) Michael Miller, 22 April 2021 (**Michael Miller s 47B evidence**);
- (m) Jo-Anne (Girlie) Miller, 22 April 2021 (**Miller s 47B evidence**);
- (n) Danielle James A’Hang, 27 April 2021 (**A’Hang s 47B evidence**);
- (o) Brenton Weetra, undated (**Weetra s 47B evidence**);
- (p) Pauline Branson, 25 March 2021 (**Branson s 47B evidence**); and

<sup>27</sup> *Doepel* [16]–[17]; *Gudjala 2008* [83], [92].

<sup>28</sup> *Bell* [98].

(q) Jody Miller, 22 April 2021 (**Jody Miller s 47B evidence**).

[69] I consider this is the extent of the material provided in support of the assertions at s 190B(5).

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

[70] As confirmed in *McLennan*, in order to satisfy the condition in s 190B(5)(a), it will be sufficient if the applicant demonstrates that:<sup>29</sup>

- (a) the claim group presently has an association with the application area, and the claim group's predecessors have had an association with the application area since sovereignty or at least since European settlement;<sup>30</sup>
- (b) 'there is an association between the whole group and the area, although not all members must have such association at all times';<sup>31</sup> and
- (c) there is an association with the whole area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'.<sup>32</sup>

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

*Association of the predecessors of the claim group with the application area*

[71] Attachment F provides:

- (a) European settlement in and around the application area occurred in the 1840s;<sup>33</sup>
- (b) Early observers recorded the extent of Nauo country as covering the southern half of the Eyre Peninsula, extending along the coast from Port Lincoln, west through Coffin Bay and Sheringa and as far as Elliston;<sup>34</sup>
- (c) Apical ancestor Mary, the mother of Henry Weetra was returning from a ceremony to the north of Nauo country when she gave birth to Henry Weetra around 1869 at Weetra station, in the south west of the Eyre Peninsula;<sup>35</sup>
- (d) Henry Weetra is recorded as visiting the Poonindie mission just north of Port Lincoln in the 1880s for rations, whilst otherwise living and travelling around Nauo country as an initiated law man, traditional doctor and healer;<sup>36</sup>
- (e) Apical ancestor Topsy Ahang is believed to have been born prior to European settlement and is associated with Nauo country around Elliston; her unprecedented marriage to a Chinese man in the 1860s was well documented and her descendants were all born and lived on Nauo country;<sup>37</sup>

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<sup>29</sup> *McLennan* [28].

<sup>30</sup> *Gudjala 2007* [52].

<sup>31</sup> *Ibid.*

<sup>32</sup> *Martin* [26]; *Corunna* [39], [45].

<sup>33</sup> Rights and interests paper [2.4].

<sup>34</sup> *Ibid* [2.3]; Weetra statement [33].

<sup>35</sup> Weetra statement [8].

<sup>36</sup> Rights and interests paper [2.5].

<sup>37</sup> Ahang statement [3]–[4], [7].

- (f) Apical ancestor Elizabeth Anderson was born in 1876 and is associated with the Mount Wedge area of the Eyre Peninsula;<sup>38</sup> she married in 1900 and had eight children, moving between different places in Nauo country including Elliston, Bramfield and Sheringa;<sup>39</sup>
- (g) Various predecessors of the claim group are buried on Nauo country, including at Port Lincoln, Lincoln National Park, around Coffin Bay and at Sheringa Beach;<sup>40</sup>
- (h) Members of the intervening generations of the claim group lived, travelled around and worked on Nauo country, including Elliston, Weetra Station, Sheringa, Poonindie, Minnipa and Coomunga, and taught current senior members of the claim group about the physical and spiritual features of Nauo country;<sup>41</sup>
- (i) The predecessors of the claim group built and used fish traps in Coffin Bay which were shown to senior members of the claim group, who continue to visit and maintain them, and have shown them to the younger claim group members;<sup>42</sup> and
- (j) The predecessors of the claim group also camped along the coastline around Coffin Bay, Mount Dutton Bay and Sheringa, including on some of the parcels which comprise the application area.<sup>43</sup>

*Association of the current claim group with the application area*

[72] The material provides the following information about the association of the current claim group with the application area:

- (a) Current claimants have inherited rights in the areas associated with their ancestors, for example, the descendants of Mary, the mother of Henry Weetra are recognised as holding rights to her country in the south-western Eyre Peninsula;<sup>44</sup>
- (b) Members of the current claim group were born and grew up on the Eyre Peninsula and spent time travelling and camping with their predecessors and learning about Nauo country, including places of spiritual significance and mythologies which traverse the country north from Coffin Bay to beyond Mount Connor;<sup>45</sup>
- (c) Soaks and rockholes with mythological significance around Coffin Bay and Mount Drummond are known to the current claimants, who continue to look after them and teach their children to do the same;<sup>46</sup>
- (d) Claimants were taught the traditional methods of fishing, and continue to fish, collect abalone and crayfish from around Sheringa, Point Drummond, Coffin Bay and Seal Corner;<sup>47</sup>

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<sup>38</sup> Byron statement [8].

<sup>39</sup> Ibid [9].

<sup>40</sup> Rights and interests paper [2.6]; Weetra statement [36]; Miller statement [5], [8], [40]; Jody Miller statement [6], [10].

<sup>41</sup> Weetra statement [7], [27]; Ahang statement [8]; Ramp statement [8]; Miller statement [7]; Michael Miller statement [12]; A'Hang s47B evidence [20], [23].

<sup>42</sup> David Buzza statement [23]; Miller statement [33].

<sup>43</sup> Weetra s 47B evidence [13]–[14].

<sup>44</sup> Rights and interests paper [2.5].

<sup>45</sup> Weetra statement [2], [11], [27]; [30]–[31]; Buzza statement [12]; Ramp statement [12]; Jody Miller statement [35].

<sup>46</sup> Weetra statement [16]–[17]; Ahang statement [21]; Miller statement [27]; Jody Miller statement [17]; Branson statement [9].

<sup>47</sup> Jody Miller statement [21]; Larking statement [11]–[12].



- (e) Current claimants and their families continue to visit and camp on Nauo country, including the parcels which comprise the application area, harvest the natural resources, fish and hunt;<sup>48</sup> and
- (f) Claimants reside around and participate in heritage surveys in Nauo country and have provided examples of their association with the specific parcels which comprise this application area, for example D54186A56 in Coffin Bay where they fish and collect cockles.<sup>49</sup>

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

[73] In considering the factual basis of this claim, I have observed that the application area covers small discreet parcels of land along the coast of the Eyre Peninsula, over which this claim group already have a registered native title claim. I note that much of the material speaks to the larger area of ‘Nauo country’ claimed in the other Nauo applications, although current claimants have also given specific information about parcels covered by this application in their ‘s 47B evidence’. I do not consider the existence of the registered Nauo claim relieves me of consideration of the information provided in support of this application, and I have considered whether this information is sufficient to support the requirements of s 190B(5)(a) below.

***Is the factual basis sufficient to support an association between the claim group and the application area, at sovereignty and since that time?***

[74] I understand from Attachment F that settlement in the region began in the 1840s and that the apical ancestors are recorded in and around the application area at that time and in the very early decades of settlement. For example, apical ancestor Mary, mother of Henry Weetra was alive around the time of settlement and I understand her descendants take their surname from Weetra station, where Henry Weetra was born in 1869. In my view, it is likely that the apical ancestors and other predecessors alive at the time of settlement had the same or a similar association with the application area as their own predecessors, who would have been alive at the time of British sovereignty. In making this retrospective inference, I have considered the judicial guidance on making such inferences in *Harrington-Smith No 9*, and the guidance in *Kanak* and *Lane* on construing the Native Title Act beneficially.<sup>50</sup>

[75] The material also provides that the intervening generations of the claim group maintained their association with the application area by continuing to live, work, camp, hunt and fish at places within it with their families. In my view, the factual basis is sufficient to support an association between predecessors of the claim group and the application area both at the time of sovereignty and since that time.

***Is the factual basis sufficient to support an association between the claim group and the application area currently?***

[76] The material provides that senior members of the current claim group grew up in and around the application area and that in recent times they have taken their descendants to visit the application area and teach them about its relevant features, including particular water sources

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<sup>48</sup> Rights and interests paper [2.6]; Jody Miller statement [17], [20]; Weetra s 47B evidence [15], [41].

<sup>49</sup> Branson statement [14]; Michael Miller s 47B evidence [10]–[11]; Branson s 47B evidence [7], [10].

<sup>50</sup> *Harrington-Smith No 9* [294]–[296]; *Kanak* [73]; *Lane* [9].

and locations where plants can be harvested and fish and animals can be caught for food. I also note that current claim group members participate in heritage surveys in and around the application area, and know about their spiritual association with the application area, as taught to them by their predecessors. In my view, the factual basis is sufficient to support an association between the current claim group and the application area.

*Is the factual basis sufficient to support an association, both past and present, with the whole application area?*

[77] I understand the task of the Registrar at s 190B(5)(a) is limited to assessing whether the factual basis is sufficient to support the assertion that the claim group have, and their predecessors had, an association over the application area as a whole.<sup>51</sup> It is not a requirement that every member of the claim group have an association with the entire application area at all times.

[78] In my view, the material demonstrates the physical association that claim group members have with the application area with the requisite geographical specificity, both historically and currently. There is information about the claim group's association with the whole of 'Nauo country', including locations along the west coast of the Eyre Peninsula where this application area is located, such as Coffin Bay, Mount Dutton Bay, Mount Drummond and Sheringa. The information shows that Nauo country extends beyond the western coastline of the Eyre Peninsula and I note the references to Coomunga and Port Lincoln to the east, Elliston further to the west, and Minnipa to the north. In my view, this information demonstrates that the claim group have an association with an area which covers and extends beyond the application area. In addition to the information provided about the larger area of Nauo country, the current claimants have provided information about specific lots affected by s 47B, including those covered by this application. In my view, the factual basis is sufficient to support an assertion of a physical association between the claim group and the application area as a whole.

[79] I also note the information about spiritually important water sources and mythologies linked to geographical features that traverse the extent of Nauo country, which the claim group were taught about by their predecessors. In my view, this information supports an assertion of a spiritual association between the claim group and the application area as a whole.

#### **Conclusion - s 190B(5)(a)**

[80] In my view, 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 a physical association of the claim group with the whole application area. I am also satisfied there is a sufficient factual basis to support an assertion of a spiritual association. This means s 190B(5)(a) is met.

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

[81] 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 gives rise to the claim to native title rights and interests. 'Native title rights and interests' is

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<sup>51</sup> *Corunna* [31].

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 understand from *Yorta Yorta* 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.<sup>52</sup>

[82] 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.<sup>53</sup>

[83] *Gudjala 2009* 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.<sup>54</sup>

[84] 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 predecessors 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)?***

[85] I consider the information extracted above at s 190B(5)(a) also supports the assertions at s 190B(5)(b), insofar as it demonstrates the passing down of laws and customs connected to the application area from the predecessors of the claim group to the current members.

[86] The material also provides the following information about the society of the claim group:

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<sup>52</sup> *Yorta Yorta* [46]–[47], emphasis added.

<sup>53</sup> *Warrie* [105], [107], emphasis added.

<sup>54</sup> *Gudjala 2009* [40].

- (a) At the time of British sovereignty, the Nauo were one of about 20 distinct and identifiable groups within the society of the 'Lakes Group' which followed common laws and customs, traded with each other and shared ritual practices and spiritual beliefs;<sup>55</sup>
- (b) The contemporary Nauo society contains key elements of the society which existed at sovereignty, including, for example, the rules of social organisation and group membership, shared ceremonies and rituals, and mutual recognition of rights to land.<sup>56</sup>

[87] The application includes the following information about the claim group's laws and customs:

(a) Land tenure

1. The laws and customs of the claim group are predicated on the religious belief that the ancestors' spirits reside in the land and created its geographical features, and through that connection to the ancestors, rights and interests in the land arise;<sup>57</sup>
2. As discussed at s 190B(5)(a) above, the Nauo ancestors are associated with certain parts of Nauo country, and consequently their descendants are recognised as holding rights and interests in those places;<sup>58</sup>
3. Early observers described the authority that senior initiated men had amongst the Nauo people to prescribe access to their country;<sup>59</sup>
4. Today, visitors to Nauo country must seek permission from senior claim group members with the requisite 'ritual authority', which can be withheld in certain circumstances;<sup>60</sup>
5. Current claimants continue to observe the rules and protocols about seeking permission and navigating safe access to country, and have taught their descendants that failure to follow the law can result in negative consequences or sickness.<sup>61</sup>

(b) Ritual and ceremony

1. In the 1870s, the rituals of the Nauo people were observed, with certain practices described as being restricted by status and gender;<sup>62</sup>
2. Senior claim group members recall restricted men's ceremonies taking place in and around Nauo country when they were children;<sup>63</sup>
3. Claimants were taught particular songs and dances by their predecessors and continue to participate in ceremonies with neighbouring groups, including gender-restricted ceremonies at spiritually important water sources.<sup>64</sup>

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<sup>55</sup> Rights and interests paper [2.5], [4.1]; Branson statement [16].

<sup>56</sup> Rights and interests paper [4.1]; Weetra statement [25].

<sup>57</sup> Weetra statement [25], [30]; Buzza statement [25]; Jody Miller statement [39]; Branson statement [15].

<sup>58</sup> Rights and interests paper [4.1].

<sup>59</sup> Ibid.

<sup>60</sup> Weetra statement [22]–[23].

<sup>61</sup> Ibid [32]; Miller statement [35]; Buzza statement [27]; David Buzza statement [55]; Michael Miller statement [19]; Branson statement [15].

<sup>62</sup> Rights and interests paper [4.1].

<sup>63</sup> Buzza statement [29].

(c) Resource use

1. In the 1870s, Nauo people were observed using digging sticks to harvest pig-face and other native vegetables in and around the application area;<sup>65</sup>
2. Today, claimants continue to harvest the natural resources, such as pig-face, wattle seed and yams with digging sticks as taught by their predecessors;<sup>66</sup>
3. Claimants also continue to hunt animals including kangaroo, wombat, emu and goanna and collect shag eggs and periwinkles on the coast, following the rules taught to them by their predecessors and described in the historical record;<sup>67</sup>
4. Claimants were taught particular rules in relation to catching and preparing fish, including the 'right way' to prepare salmon, which they have taught to their children;<sup>68</sup>
5. Rules also continue to be observed with regard to the preparation and apportionment of meat and the taboo on eating certain organs, for example, children are prohibited from eating kangaroos' kidneys and the successful hunter is entitled to eat the animal's liver.<sup>69</sup>

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

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

[88] The application identifies a regional pre-sovereignty society, in which the Nauo people were an identifiable group. In *Harrington-Smith No 5*, the Federal Court observed that the traditional laws and customs under which the rights and interests claimed are held might be also traditional laws and customs of a wider population, without that wider population being a part of the claim group.<sup>70</sup> In my view, the factual basis of this application demonstrates that while certain laws and customs were and are observed by a wider society, rights to land are held by members of different groups, and in relation to the area on the Eyre Peninsula known as 'Nauo country', which includes the application area, such rights are held by this claim group.

[89] The application also describes the participation of the predecessors of the claim group in the activities of the greater Lakes society, for example the information extracted at s 190B(5)(a) about Mary, mother of Henry Weetra, travelling north to participate in a regional ceremony. The application also provides that the current claimants are the descendants of those predecessors, both in the claim group description in Schedule A and in the factual basis material. In my view, the factual basis supports a link between the pre-sovereignty society, the predecessors and the current claim group.

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<sup>64</sup> Branson statement [10]–[12].

<sup>65</sup> Rights and interests paper [2.6].

<sup>66</sup> Ibid; Jody Miller statement [17], [20]; Buzza statement [21], [23]; Weetra s 47B evidence [15], [41].

<sup>67</sup> Rights and interests paper [2.6]; David Buzza statement [14], [18], [22].

<sup>68</sup> A'Hang s 47B evidence [33].

<sup>69</sup> Weetra statement [12]–[13]; David Buzza statement [34].

<sup>70</sup> *Harrington-Smith No 5* [53].

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

[90] I consider the application demonstrates the existence of laws and customs with normative content which were observed at the time of settlement and have been handed down to the current claimants. From the material I understand that the authority of senior initiated men to mediate safe and appropriate access to country continues to have normative force. The material demonstrates that claimants continue to perform ceremonies and observe the rules of gender-restrictions, as taught to them by their predecessors. I note the detailed information about claim group members, past and present, utilising particular natural resources including certain fish, animals and plants, and that the rules pertaining to the harvest, capture and preparation of these resources continue to be observed by the current claim group members. The material shows that senior members of the claim group are passing on these laws and customs to their descendants in the same ways as they were taught by their predecessors, through teaching, oral transmission and common practice. I consider it is reasonable to infer that those predecessors were taught these laws and customs in a similar manner by their own predecessors, back to at least the time of settlement. In my view, there is sufficient information to support the assertion that the laws and customs of the claim group are 'traditional' in the *Yorta Yorta* sense.<sup>71</sup>

**Conclusion – s 190B(5)(b)**

[91] I am satisfied the factual basis supports 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)?**

[92] 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.<sup>72</sup> 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.<sup>73</sup>

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

[93] Where only a few generations separate current members of a claim group from the apical ancestors who were alive at the time of settlement in the application area, such as in this case, I consider an inference of continuity can more easily be made. I consider the application contains sufficient examples of the continuing observance of traditional laws and customs, such as the requirement to seek permission to access certain places, the continued observation of gender restrictions on certain places and related ceremonies, and the continued application of the rules for appropriate resource use. In my view, these examples and others found in the application sufficiently demonstrate how the traditional laws and

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<sup>71</sup> Ibid.

<sup>72</sup> *Gudjala 2009* [29].

<sup>73</sup> *Gudjala 2007* [82].

customs have been observed by the claim group, substantially uninterrupted, since at least the time of settlement in the application area.

### **Conclusion – s 190B(5)(c)**

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

### **Conclusion**

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

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

### **What is required to meet s 190B(6)?**

[96] 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.

[97] I understand the condition of s 190B(6) requires some measure of the material provided in support of the claim and imposes a more onerous test to be applied to the individual rights and interests claimed.<sup>74</sup> I also understand that the words ‘prima facie’ mean that if a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.<sup>75</sup> It is therefore my task to consider whether there is 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 will be entered on the Register.<sup>76</sup> I have grouped rights together in my consideration below where it is appropriate and convenient to do so.

### **Consideration**

#### ***Which of the claimed native title rights and interests are established on a prima facie basis?***

##### ***(a) the right of access, to be present on, move about on and travel over the Native Title Land;***

[98] The application contains numerous examples of claim group members, past and present, accessing and travelling over the application area, several of which I have extracted at s 190B(5) above.<sup>77</sup> I note that current claimants have provided specific statements in relation to their presence, for various activities, on the areas affected by s 47B, including the particular parcels which comprise the application area.<sup>78</sup> The material also describes the claim group’s predecessors’ presence on and travels across the application area and the greater region, for

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<sup>74</sup> *Doepel* [126].

<sup>75</sup> *Ibid* [135].

<sup>76</sup> Section 186(1)(g).

<sup>77</sup> Rights and interests paper [2.6]; Jody Miller statement [17], [20]; Weetra s 47B evidence [15], [41].

<sup>78</sup> Michael Miller s 47B evidence; Miller s 47B evidence; A’Hang s 47B evidence; Weetra s 47B evidence; Branson s 47B evidence; and Jody Miller s 47B evidence.

various purposes including trade and ceremony.<sup>79</sup> I consider this right is prima facie established.

*(b) the right to take, enjoy, share and exchange the Natural Resources of the Native Title Land for traditional purposes;*

*(c) the right to use the natural water resources of the Native Title Land for traditional purposes;*

[99] I have grouped the above rights together as they each involve the use of resources in the application area. As discussed above at s 190B(5), there are examples in the material of claim group members taking natural resources from the application area, including native vegetables, fish, and animals.<sup>80</sup> Claimants also describe how they find and use natural water resources, as taught to them by their predecessors.<sup>81</sup> The rules of apportionment or sharing of particular resources, pursuant to the claim group's traditional laws and customs, are also outlined.<sup>82</sup> Claimants describe how they and their predecessors trade and exchange certain resources, such as wombats, with their northern neighbours.<sup>83</sup> I consider these rights are prima facie established.

*(d) the right to conduct ceremonies on the Native Title Land;*

*(e) the right to maintain and protect sites and places of cultural significance under the traditional laws and customs of the Native Title Holders on the Native Title Land;*

*(f) the right to teach on the Native Title Land the physical and spiritual attributes of the Native Title Land;*

*(g) the right to hold meetings on the Native Title Land;*

*(h) the right to light fires on the Native Title Land for domestic purposes including cooking, but not for the purpose of hunting or clearing vegetation; and*

[100] I have grouped these rights together as they each involve the doing of particular activities on the application area. The claim group continue to observe ceremonies that were also observed by their predecessors,<sup>84</sup> and maintain significant sites such as soaks and waterholes.<sup>85</sup> Claimants describe being taught the physical and spiritual attributes of the application area by their predecessors, which they now teach to their children.<sup>86</sup> Claimants also describe particular meetings held on Nauo country in recent times.<sup>87</sup> Examples are also given of claimants using fire and hot coals to cook animals.<sup>88</sup> I consider these rights are prima facie established.

*(i) the right to be accompanied onto the Native Title Land by those people who, although not Native Title Holders, recognise and are bound by the traditional laws and customs of the Native Title Holders*

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<sup>79</sup> Buzza statement [16]; Weetra statement [8].

<sup>80</sup> Rights and interests paper [2.6]; David Buzza statement [14], [18], [22]; A'Hang s 47B evidence [33].

<sup>81</sup> Jody Miller statement [24].

<sup>82</sup> Weetra statement [12]–[13]; David Buzza statement [34].

<sup>83</sup> Buzza statement [16]; Jody Miller statement [22].

<sup>84</sup> Branson statement [10]–[12].

<sup>85</sup> Weetra statement [16]–[17]; Ahang statement [21]; Miller statement [27]; Jody Miller statement [17]; Branson statement [9].

<sup>86</sup> Ibid.

<sup>87</sup> Jody Miller s 47B evidence [9].

<sup>88</sup> Weetra statement [21].



and who are:

*i) spouses of Native Title Holders; or*

*ii) people required by traditional law and custom for the performance of cultural activities on the Native Title Land.*

[101] Examples are provided of claim group members being accompanied on to the application area by their spouses and other non-native title holders, such as anthropologists, for the performance of cultural activities.<sup>89</sup> I consider this right is prima facie established.

## Conclusion

[102] 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 be considered 'native title rights and interests'. This is because, 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.

## Traditional physical connection – s 190B(7): condition met

What is required to meet s 190B(7)?

[103] To meet s 190B(7), the Registrar must be satisfied at least one member of the 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 certain things done.

[104] 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.<sup>90</sup>

## Consideration

[105] As discussed above at s 190B(5), the application contains information about the claim group's association with Nauo country and the specific parcels of the application area, including places where claim group members camped, hunted, fished and performed ceremonies with their predecessors, and where they continue to do so today with their descendants. I consider this information demonstrates that members of the claim group have a physical connection to the application area.

[106] I also consider the claimants' connection with the application area is 'traditional' in the sense required by s 190B(7). 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

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<sup>89</sup> Weetra statement [26].

<sup>90</sup> *Doepel* [18]; *Gudjala 2009* [84].

by their predecessors, as discussed above at s 190B(5)(b), it follows that I am satisfied their connection with the application area is in accordance with those traditional laws and customs.

## Conclusion

[107] I am satisfied at least one member of the claim group currently has a traditional physical connection with a part of the claim 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**

### What is required to meet s 190B(8)?

[108] Section 190B(8) requires the application comply with ss 61A(1)–(3).

## Consideration

[109] In my view, the application complies with each of the requirements of ss 61A(1)–(3):

Section	Requirement	Information	Result
s 61A(1)	Claimant application not to be made covering areas of approved determination of native title	The geospatial report states and my own searches confirm that the application does not cover an area where there has been an approved determination of native title.	Met
s 61A(2)	Claimant application not to be made covering previous exclusive possession act areas	Schedule L	Met – see reasons below
s 61A(3)	Claimant application not to claim possession to the exclusion of all others in previous non-exclusive possession act areas	I understand from Schedule E that no claim to exclusive possession is made.	Met

### **Section 61A(2)**

[110] Schedule L claims the benefit of s 47B. I therefore understand the intention of the applicant is to claim native title only where extinguishment can be disregarded through the application of that provision. Such a claim would necessarily exclude any areas where native title has been extinguished by previous exclusive possession acts. I understand that the requirements of the registration test are already stringent and that it is appropriate to construe the Native Title Act in a way that renders it workable in the advancement of its main objectives.<sup>91</sup> I therefore consider it is appropriate to interpret the application beneficially and as such, I am satisfied the requirements of s 61A(2) are met.

## Conclusion

[111] I am satisfied the requirements of s 190B(8) are met.

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<sup>91</sup> *Strickland* [55].

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

What is required to meet s 190B(9)?

[112] 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).

### Consideration

[113] In my view, the application does not contravene any of the restrictions found in s 190B(9):

Section	Requirement	Information	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 any minerals, petroleum or gas 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 'N/A' so I understand that no claim of exclusive possession is made in relation to any offshore place	Met
s 190B(9)(c)	Native title rights and/or interests in the claim area have otherwise been extinguished, except where required to be disregarded under ss 47(2), 47A(2), 47B(2) or 47C(8)	Schedule L states that the applicant relies on s 47B such that any prior extinguishment of native title is required to be disregarded	Met

### Conclusion

[114] I am satisfied the requirements of s 190B(9) are met.

*End of reasons*

## Attachment A

### Summary of registration test result

Application name	Nauo #4
NNTT No.	SC2021/004
Federal Court of Australia No.	SAD185/2021
Date of Registration Decision	28 January 2022

### Section 190B conditions

Test condition	Sub-condition/requirement	Result
s 190B(2)		Met
s 190B(3)		Met
s 190B(4)		Met
s 190B(5)	ss 190B(5)(a)–(c)	Met
s 190B(6)		Met
s 190B(7)		Met
s 190B(8)		Met
s 190B(9)		Met

### Section 190C conditions

Test condition	Sub-condition/requirement	Result
s 190C(2)	ss 61–2	Not met
s 190C(3)		Not met
s 190C(4)	s 190C(4)(a)	Not met
s 190C(5)		Not applicable