National Native Title Tribunal

Registration test decision

Application name	First Peoples of the Millewa-Mallee Claim (Millewa-Mallee)
Name of applicant	Rex Harradine, Janine Wilson, Norm Wilson (Snr), Darren Perry (applicant)
Application made	8 October 2015
Application amended	19 October 2015
Tribunal No.	VC2015/001
Federal Court No.	VID630/2015

My decision under s 190A of the *Native Title Act 1993* (Cth)[1] is that the claim in the Millewa-Mallee amended application satisfies all of the conditions in ss 190B and 190C of the Act. It follows that the claim must be accepted for registration[2] and entered on the Register of Native Title Claims.[3]

Date of decision: 13 May 2016

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Susan Walsh, Practice Manager[4]

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1 All legislative sections are from the *Native Title Act 1993* (Cth) (the Act), unless I state otherwise.

2 See s 190A(6) of the Act.

3 See s 190(1) of the Act.

4 Delegate of the Native Title Registrar under a written delegation dated 20 November 2015 pursuant to s 99 of the Act.

Introduction

[1] The Federal Court provided a copy of the Millewa-Mallee amended application to the Native Title Registrar under s 64(4) of the Act on 23 October 2015. This has triggered the duty to consider the claim in the amended application against the registration test conditions set out in ss 190B and 190C.[5] If the claim in the amended application satisfies all of the conditions, then the Registrar must accept the claim for registration.[6] If the claim does not satisfy all of the conditions, the Registrar must not accept the claim for registration.[7] My decision is that the claim satisfies all of the registration test conditions and my reasons against each condition now follow.

Conditions about the merits of the claim: s 190B(1)

Decision on identification of area subject to native title: s 190B(2)

[2] The claim meets the requirements of s 190B(2) as I am satisfied that the written description and the map of the external boundary and the written description of internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters covered by the application. My reasons now follow.

What is needed to meet s 190B(2)?

[3] To meet s 190B(2), the Registrar 'must be satisfied that the information and map contained in the application … are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.' The two questions for this condition are whether the information and map provide reasonable certainty about the external boundary of the area of land or waters covered by the application and any areas within that external boundary not covered.[8]

Does the information provided about the external boundary meet s 190B(2)?

[4] Attachment B of the application contains a written description of the external boundary using metes and bounds and references to intersecting roads, highways and SA/VIC/NSW state borders. Item 6 of schedule B specifically excludes areas covered by a number of surrounding approved native title determinations and a registered ILUA. Attachment C of the application contains a colour copy of a map which depicts the external boundary with a bold blue outline. The map shows topographic features and non-freehold parcels. State borders are depicted by a bold black line. There is a scalebar, northpoint, legend, coordinate grid and location diagram. There are notes relating to the source, currency and datum of data used to prepare the map.

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5 See s 190A(1).

6 See s 190A(6).

7 See s 190A(6B). (I note that s 190A(6A) does not apply because the amendment to the application took place before the Registrar had finished considering the claim in the original application.)

8 See Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*Northern Territory v Doepel*) at [122].

[5] I find that the written description and the map are comprehensive, detailed and consistent. Armed with this information, the external boundaries of the area can be located on the earth's surface with a reasonable degree of certainty. The application clearly covers an area of land and waters in the north-west of Victoria, with a western boundary that abuts the VIC/SA border, a northern boundary that abuts the VIC/NSW border along the Murray River, an eastern boundary that follows the Murray River and then the Calder Highway and a southern boundary that follows the Mallee Highway. All of these features are clearly described in Attachment B and shown on the map in Attachment C.

[6] I find that the written description and the map are comprehensive, detailed and consistent. Armed with this information, the external boundaries of the area can be located on the earth's surface with a reasonable degree of certainty. Accordingly, the information satisfies the requirements of s 190B(2) insofar as the external boundary is concerned.

Does the information about excluded areas within the external boundary meet s 190B(2)?

[7] Schedule B of the application contains a written description of internally excluded areas by reference to relevant provisions of the Act and the *Land Titles Validation Act* 1994 (Vic). This essentially excludes from claim, those areas where there has been extinguishment of native title, for example by a previous exclusive possession act defined in s 23B of the Act and extinguishment cannot be disregarded as a result of the operation of either Act.

[8] I find that the written description of the internally excluded areas is reasonably clear. It will be possible to work out any internally excluded areas affected by the extinguishment defined in Schedule B, once a search of historical and current tenure for the application area is completed.[9]

Decision on identification of native title claim groups: s 190B(3)

[9] The claim meets the requirements of s 190B(3) as I am satisfied that the application contains a sufficiently clear description of the persons in the native title claim group, so that it can be ascertained whether any particular person is in that group. My reasons now follow.

What is needed to meet s 190B(3)?

[10] To meet s 190B(3), the Registrar 'must be satisfied that: (a) the persons in the native title claim group are named in the application; or (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.' The only question for this condition is 'whether the application enables the reliable identification

[9] This approach is supported by the decisions in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (Nicholson J) and *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [51] to [52] (French J, as the Honourable Chief Justice then was).

of persons in the native title claim group.'[10] There is no place under this condition to consider whether the application identifies the correct native title claim group.[11]

Does the description of the persons in the native title claim group meet s 190B(3)?

[11] Schedule A of the application does not name all of the persons in the claim group in the manner identified by s 190B(3)(a). The question is therefore whether the description of the native title claim group in Schedule A satisfies s 190B(3)(b). Schedule A of the application states that the members of the native title claim group comprise the descendants of the apical ancestors, John and Nelly Perry and Elizabeth Johnson.

[12] The description is sufficiently clear. It has long been accepted that defining the current members of a claim group as descendants of named persons even where those persons were alive long ago, is sufficient as it provides a 'substantial factual element'[12] and a clear basis for a 'factual inquiry'.[13]

Decision on identification of claimed native title: s 190B(4)

[13] The claim meets the requirements of s 190B(4) as I am satisfied that the description in the application is sufficient for me to clearly understand and identify the itemised rights as 'native title rights and interests'. My reasons now follow.

What is needed to meet s 190B(4)?

[14] To meet s 190B(4), the Registrar 'must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the claimed native title rights and interests to be readily identified'. The question for this condition is whether the claimed rights are described clearly, comprehensively and in a way that is meaningful and understandable, having regard to the definition of the term 'native title rights and interests' in s 223 of the Act.[14]

Does the description of the native title rights and interests meet s 190B(4)?

[15] Schedule E of the application provides a description of the claimed native title rights and interests. In areas where there has been no extinguishment to any extent of native title or where extinguishment must be disregarded, the claimed right is 'possession, occupation, use and enjoyment of land and waters as against all others.'

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10 *Northern Territory v Doepel* at [51] and also at [37].

11 *Northern Territory v Doepel* at [37] and the decision of Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), that this condition 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification'—at [33].

12 *Ward v Registrar, National Native Title Tribunal* (1999) 168 ALR 242; [1999] FCA 1732 at [27] (Carr J).

13 *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [63] to [69] (Carr J).

14 *Northern Territory v Doepel* at [99] and [123].

[16] Over areas where native title is only partially recognisable because of extinguishment, the claimed rights are described as the non-exclusive rights to:

(a) have access to, remain on and use the land and waters

(b) access and take the resources of the land and waters

(c) protect places, areas and things of traditional significance on the land and waters.

[17] This description is carefully drafted and clearly explains the identified native title rights and interests. The description is sufficient for me to clearly understand and identify the itemised rights as 'native title rights and interests'.

Decision on factual basis for claimed native title: s 190B(5)

[18] The claim meets the requirements of s 190B(5) as I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion and the three particular assertions in that section. My reasons now follow.

What is needed to meet s 190B(5)?

[19] 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 assertion.' Section 190B(5) then states that the factual basis must support three particular assertions relating to:

(a) an association by the claim group and their predecessors with the area;

(b) the existence of traditional laws and customs acknowledged and observed by the native title claim group giving rise to the claimed native title; and

(c) the claim group continuing to hold the native title under those traditional laws and customs.[15]

[20] The question for this condition is whether the factual basis is sufficient to support the general assertion that the claimed native title exists and the three particular assertions set out in s 190B(5)(a), (b) and (c). Answering this does not involve a hearing by the Registrar of the Millewa Mallee group's claim to hold native title in relation to the area covered by the application. At the end of the day, whether or not the Millewa Mallee native title claim group hold native title is for the Federal Court to hear and determine.

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15 See the particular assertions set out in subsections (a), (b) and (c) of s 190B(5).

[21] That the Registrar's consideration of the claim against this condition is limited is supported by the case law. After generally considering the provisions of ss 190B and 190C, Mansfield J held in *Northern Territory v Doepel* that:

> It is trite to observe that the nature of the Tribunal's task is defined by those provisions. Its task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application.[16]

[22] Mansfield J found that the task for the condition of s 190B(5) is to 'address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests'.[17] Mansfield J held that it is not for the Registrar to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'.[18]

[23] A Full Court of the Federal Court agreed with Mansfield J about the limits of s 190B(5), holding that what is not required to satisfy this condition is 'evidence that proves directly or by inference the facts necessary to establish the claim'.[19] Nonetheless, the Full Court found that the factual basis 'must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality.'[20]

[24] If there is a sufficient factual basis for each particular assertion of s 190B(5), then there will also be a sufficient factual basis to support the general assertion at the head of s 190B(5) that the claimed native title rights and interests exist.[21] I therefore consider below the sufficiency of the factual basis against each of the three particular assertions of ss 190B(5)(a), (b) and (c).

Decision on assertion of s 190B(5)(a)

[25] The factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area. My reasons for this now follow.

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

[26] Generally on what is needed for the 'association' assertion:

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16 *Northern Territory v Doepel* at [16].

17 *Northern Territory v Doepel* at [17].

18 *Northern Territory v Doepel* at [17].

19 *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157; (*Gudjala 2008*), per French J(as the Honourable Chief Justice then was) & Moore and Lindgren JJ at [83] and [92].

20 *Gudjala 2008* at [92].

21 *Northern Territory v Doepel* at [131]–[132] and *Gudjala 2007* at [43].

(a) it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times;[22]

(b) it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;[23] and

(c) the materials must support that the association both presently and by the group's predecessors relates to the area as a whole.[24]

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

[27] The association asserted to exist in this case relates to an area with a northern boundary that follows the Murray River and the NSW/VIC border; a western boundary that follows the VIC/SA border; a southern boundary that follows the Mallee Highway; and an eastern boundary that follows the Calder Highway. The application essentially covers the mallee lands below the Murray River, including the Murray Sunset National Park, in north-west Victoria from the Murray-Darling junction in the east to the VIC/SA border in the west.

[28] There are statements in Schedule F of the application which substantiate that the area was widely inhabited by Aboriginal people when the European explorers and settlers arrived in the region from about 1829—paras 4 and 6, Sch F. The first such encounter is documented in the published notes of the explorer Charles Sturt and his expedition party. Sturt's published notes show that he encountered many Aboriginal people on his journey in 1829 down the Murrumbidgee, Murray and Darling Rivers. It is claimed that Sturt's notes reveal that his party came dangerously close to violence near the junction of the Murray and Darling Rivers at Wentworth, when a large group of Aboriginal people tried to stop Sturt and his party from landing—para 5, Sch F. (The Murray-Darling junction is located on the north-eastern external boundary.)

[29] It is asserted that the Aboriginal people encountered by Sturt and subsequent explorers and settlers are the predecessors of the claim group and that they occupied a traditional territory that encompassed the Murray River and surrounding lands from Gunbower in Victoria in the east to Morgan in South Australia in the west. The relevant pre-sovereignty society to which these predecessors belonged is identified as the 'Central Murray Riverine Society'—para 7, Sch F.

[30] The information relating to association with the area is found within a mix of documents:

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22 *Gudjala 2007* at [52].

23 *Gudjala (2007)* at [51] and [52].

24 See *Martin* at [23]–[26], affirmed by Siopis J in *Corunna v Native Title Registrar* [2013] FCA 372 (24 April 2013) at [35]–[39] and [42]–[44].

(a) Attachment F1 of the application contains a general description of the asserted association

(b) Attachments F2, F3 and F4 contain statements signed by members of the claim group[name removed], [name removed], and [name removed],

(c) There is additional information provided directly to the Registrar by the applicant on 15 April 2016 comprising:

i. Additional, confidential material provided directly to the Registrar; and

ii. affidavits signed by members of the claim group, [name removed],, [name removed] and [name removed].[25]

[31] [Name removed] describes growing up and learning about the traditional ways of his Aboriginal ancestors along the lower reaches of the Murray in South Australia. He spent most of his childhood on-country around the Murray River—para 5, Att F2. He lived with his aunts and uncles on the banks of the Murray at Nidolte and then moved to Gerard with his brothers and sisters, travelling along the river and stopping at different places. To survive and make ends meet they used to sell rat skins and baby turtles—para 7, Att F2. He was always around the old people, who passed on a great deal of information about the traditional ways of his ancestors. He spent a lot of time on country with his uncle, hunting, fishing and going bush learning about his culture—para 11, Att F2.

[32] [Name removed] asserts that his association with the application area is derived from traditional laws and customs whereby he inherits or takes country from his Aboriginal ancestors, [name removed] —paras 14, 17, 25 & 30, Att F2. [name removed] describes spending plenty of time in the mallee country south of the Murray River, camping, hunting, fishing and being taken there by his mother's brothers who would show him around and teach him about his country—paras 18–19 and 47–56, Att F2. He has taught his children all these things and took them out to country so that they could learn them—para 57, Att F2.

[33] The evidence from [name removed] (Att F3 of the application) and [name removed] (Attachment F4 of the application) provides information similar to [name removed] and evinces a life-long association with the application area that is grounded in the inter-generational transmission of traditional customs and practices relating to hunting, fishing, protection of traditional sites along the Murray River and the southern mallee lands covered by the application.

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25 These are the affidavits dated 13 and 14 April 2016 respectively.

[34] The link asserted between the native title claim group and their predecessors is verified as coming from the area in the early settlement period. Settlement took place over time from 1829 with Sturt's expedition along the Darling, Murray and Murrumbidgee Rivers until the 1840s.

[35] [Information contained in additional material provided directly to the Registrar which remains confidential, removed]

[36] [Information contained in additional material provided directly to the Registrar which remains confidential, removed]

[37] [Information contained in additional material provided directly to the Registrar which remains confidential, removed]

[38] The second apical ancestor for the claim group, [name removed], was said to have been born in 1859 and to have married [name removed] in 1874 at Point McLeay on the lower Murray, where she was living. It is asserted that [name removed] and her husband were part of the central Murray riverine group of Aboriginal persons with an association to the application area. It is understood that [name removed] took refuge along the lower Murray in South Australia as a result of the frontier conflict being played out on their homelands central Murray homelands, around the Murray-Darling junction area—para 11, Att F.

[39] The factual basis is sufficient to demonstrate that there is a history of association by the native title claim group and by their predecessors with the area over the time since European settlement. I am satisfied that the information provided in the application and the additional information received from the applicant on 15 April 2016 to support the existence of a link between the current claim group, their predecessors and the pre-sovereignty Millewa-Mallee group identified in the early historical and ethnographic records. The factual basis materials also support an assertion that the claim group presently have an association with the area and that this has its origins in the association by their predecessors with the area. The totality of the information leads me to find that the factual basis is sufficient to support the assertion that the native title claim group has, and the predecessors of those persons had, an association with the area.

Decision on assertion of s 190B(5)(b)

[40] The factual basis is sufficient to support an assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests. My reasons for this now follow.

What is needed for the assertion of s 190B(5)(b)?

[41] The wording of s 190B(5)(b) is almost identical to paragraph (a) of the definition of 'native title rights and interests' within s 223(1) of the Act. Dowsett J approached this in *Gudjala 2007* by considering s 190B(5)(b) in light of the case law regarding s 223(1)(a), particularly the leading

decision of the High Court of Australia in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*).[26]

[42] According to the High Court's decision in *Yorta Yorta*, a law or custom is 'traditional' where:

(a) it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice'—at [46];

(b) the origins of the content of the law or custom concerned can be found in the normative rules of a society[27] which existed before the assertion of sovereignty by the Crown—at [46];

(c) the normative system has had a 'continuous existence and vitality since sovereignty'—at [47];

(d) the relevant society's descendents have acknowledged the laws and observed the customs since sovereignty and without substantial interruption—at [87].

[43] Dowsett J found that a sufficient factual basis must therefore demonstrate that the laws and customs relied on by the claim group 'have their source in a pre-sovereignty society and have been observed since that time by a continuing society'. Dowsett J held that a 'starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860'. His Honour concluded that a sufficient factual basis must also establish the link between the native title claim group described in the application and the area covered by the application, which involves 'identifying some link between the apical ancestors and any society identified at sovereignty'.[28]

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

[44] It is not appropriate that I impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the factual basis condition of s 190B(5).[29] With these constraints in mind, I find that the factual basis provides information to

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

27 The term 'society' in this context is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs'—*Yorta Yorta* at [49].

28 See *Gudjala 2007* at [63] and [66] respectively. Although the Full Court found error in Dowsett J's evaluation of the factual basis materials, the Full Court did not disagree with his Honour's assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs'—*Gudjala 2008* at [96]. (1850–1860 is the time of European settlement of the Gudjala application area.)

29 I refer also to my analysis of the case law at the outset of the reasons for this condition. I refer also to a recent decision by Barker J that 'it must be borne in mind that the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists'—*Stock v Native Title Registrar* [2013] FCA 1290 (29 November 2013) at [64] and also at [65]–[66].

sufficiently explain the identity of the relevant pre-sovereignty society, which operated in region within the application area.

[45] This is the asserted Central Murray Riverine society with a provenance along the Murray River from Gunbower, Victoria in the east to Morgan, South Australia in the west. Attachment F refers to a number of references in the early historical and ethnographic records for the Central Murray Riverine region, which support the existence of this society in the region at the time of effective sovereignty:

(a) Peter Beveridge, founder of Tyntynder Station on the Murray River in 1845 and Piangil Station in 1846, wrote many articles on his personal observations of the local Aboriginal people and gave evidence to the Select Committee of the Legislative Council on the Aborigines in 1858.
(b) The naturalist William Blandowski set up camp in 1856-57 and employed local Aboriginal men, women and children as collectors of specimens, the results from which were published in 1862 as *Australia in 142 Photographic Specimens From 10 Year's Experience*.
(c) The 1863 population and statistics census undertaken for the Board for the Protection of Aborigines for an unnamed informant collected data concerning population and statistics in the Central Murray Riverine region.

(d) A.L.P Cameron, an amateur anthropologist published several articles on Aboriginal ethnography in the latter years of the nineteenth century and early twentieth century. Cameron's various works include efforts to outline the location of Aboriginal groups in the vicinity of the Murray, Darling and Murrumbidgee River confluences.

(e) Edward Micklethwaite Curr was a squatter who collected Aboriginal vocabularies which resulted in a four volume publication published in 1886 titled *The Australian Race*.

(f) Alfred William Howitt, an explorer, natural scientist and amateur ethnographer, recorded information about the groups of the lower Murray in both his personal papers and in his 1904 publication *Native Tribes of South-East Australia*.

(g) Lorimer Fison, a journalist and amateur ethnographer, published a large number of articles on Aboriginal kinship and social organisation, often relying on fieldwork conducted by his colleague Alfred Howitt. The two men co-wrote and published many works on the topic of Victorian Aboriginal people.

(h) R.H. Mathews, surveyor and amateur ethnographer, published numerous articles on Aboriginal ethnography between 1893 and 1918. His work included

information about group boundaries included Aboriginal people from the Murray River region.

(i) George Augustus Robinson, Chief Protector of the Port Phillip District from 1839 to 1849, made some thirty expeditions throughout the district, kept private diaries and published numerous reports in which there are several references to the Aboriginal people of the Murray River region.

(j) Edmund Morey established a run at Euston, on the Murray River, from 1846 until 1861. Morey published reminiscences of his observations of and encounters with the Aboriginal people in the vicinity of his station.

(k) Alfred Radcliffe-Brown was a significant figure in both British and Australian anthropology in the early decades of the twentieth century. He conducted research in several places in Australia, including the lower Murray, resulting in the publication of his articles on the social organisation of tribes.

(l) Robert Brough Smyth was the Secretary of the Board for the Protection of Aborigines in Victoria from 1860 to 1878. During this time he collected information on the languages and cultures of Aboriginal people in Victoria, largely through the correspondence with local settlers and 'Protectors' of Aborigines. His efforts resulted in the publication of his book, *The Aborigines of Victoria* in 1876.

(m) The anthropologists Ronald and Catherine Berndt conducted extensive fieldwork with the Yaraldi (Kukabrak) of the Ngarrindjeri people (of the lower Murray) in the 1930–40s. The Berndts gained a detailed understanding of traditional life amongst the Yaraldi people, which included an understanding of their relationships with their other groups along the Murray, including the people of the Central Murray Riverine.

[46] The assertion in Attachment F is that these observations and writings about the Aboriginal peoples of the Murray River provide a record of 'many of the traditional relationships and provide the genealogical and fieldwork data that suggest that, within these communities, the descent of rights to, and on country, was maintained through intergroup relationships arising from instances of customary law'—see para 5, Att F.

[47] Attachment F provides the following details about the asserted traditional laws and customs acknowledged and observed by the members of Central Murray Riverine Society:

(a) The society comprised large number of interacting landholding groups which held native title at sovereignty. These landholding groups were members of a single society, bound by normative laws and customs which governed their systems of

kinship, ritual, trade and environment. There were further internal boundaries within the society where the landholding groups were distinguished by small differences such as dialect.

(b) There was a cross-linked mosaic of associations (through marriage, trade, ceremony) and amity between the landholding groups, across the territory associated with the society, which coalesced through the custom of holding meetings of associated groups at resource-rich sites within the territory;

(c) Rights and interests in land were allocated to and held by less inclusive local landholding groups. These groups asserted traditional ownership of particular areas of country and were recognised as traditional owners by other members of the society;

(d) Traditional laws and customs relating to succession operated so that responsibility for vacant localised territories was transferred between members of the society—see paras 6–7, Att F.

[48] Attachment F states that by the time Smyth was appointed to the Board for the Protection of Aborigines in 1860, the Aboriginal population of Victoria had declined significantly—para 8, Att F. The assertion is that:

> Ethno-historical and historical records show that as the number of landholding groups decreased between the 1840s and 1870s as a result of the decline in the population, the extent of the territory they held increased. The net effect was that no territory was lost to the society. Rather, formerly local territories merged or were succeeded to in accordance with the traditional laws and customs of the society as a whole.[30]

[49] On the question of links between the pre-sovereignty society, the claim group and their apical ancestors, the application asserts that members of the claim group are direct descendants of those Aboriginal persons who occupied the claim area at least at the time of first contact. These are the apical ancestors, Elizabeth Johnson and John and Nelly Perry, whose links to the claim area are described as follows:

(a) Elizabeth Johnson was born in 1859. The Johnson family name has been strongly associated with the Central Murray Riverine area, including through a woman named Annie Johnson who provided linguistic information to researcher R.H. Mathews in the early settlement period following effective sovereignty. The Johnson family name also appears prominently in the Murray-Darling junction area (the region that was subject to the brunt of the frontier conflict that occurred on the mid-Murray). Elizabeth Johnson and her husband, John Bonney, married in

[30] See para 9, Att F.

1874 and had many children. The surname Bonney is similarly prominent around the Central Murray Riverine in historical records—para 11(a), Att F.

(b) John Perry was born in 1854, whilst the historical records suggest that Nelly Perry was born either in 1845 or 1855. Together they had five children. Norman Tindale recorded the birth of two of their children at Mildura. Tindale's research places the Perry family as originating from the Central Murray Riverine region and this is verified from records from registered births, deaths and marriages—para 11(b), Att F.

[50] There is also information in the application that describes the transmission in a direct line from the ancestors to current claimants of traditional knowledge about their country in the mallee lands of north west Victoria below the Murray River. There is evidence that current claimants interact with Millewa-Mallee country in the traditional ways of their parents and grandparents before them.

[51] The information provided by [name removed], [name removed], [name removed]and [name removed]provides further support for the assertion that there are traditional laws and customs derived from a pre-sovereignty society which give rise to the claimed native title rights and interests. These persons speak to the matters asserted in Attachment F concerning the continuity over time of a shared system of traditional law and custom whereby rights are generated as a result of descent from ancestors associated with the area in the post-settlement period.

[52] The factual basis materials referred to above set out the necessary facts in a sufficiently detailed way so that I can understand both the identity of the relevant pre-sovereignty society, the area over which it is asserted to have been observed and the links between that society, the current members of the claim group, their apical ancestors and the application area. To conclude my reasons for this particular assertion, the information does provides a sufficient factual basis for the assertion that there exist traditional laws and customs derived from a pre-sovereignty society identified in the early records and that the claim group and their apical ancestors can demonstrate their links to this group over time.

Decision on assertion of s 190B(5)(c)

[53] I am satisfied that the factual basis is sufficient to support the assertion of s 190B(5)(c).

What is needed for the assertion of s 190B(5)(c)?

[54] To meet s 190B(5)(c), the factual basis must support the assertion 'that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.'

[55] The factual basis must address that the claim group has continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of the word 'traditional' when used in the s 223(1)(a) definition of 'native title rights and interests' discussed at [47] and [87] of *Yorta Yorta*.

[56] The case law on this assertion indicates the following kinds of information are required:

(a) That there was a society that existed at sovereignty observing traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed on to the current claim group;

(b) That there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least to European settlement.[31]

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

[57] The factual basis material identifies the pre- sovereignty society and the persons who acknowledged and observed the laws and customs of the relevant society, being the Central Murray Riverine Society. There is information within the factual basis that goes to showing a similarity in laws and customs acknowledged and observed by the ancestors and those of the current native title claim group. There is material that outlines the transmission of laws and customs throughout the generations that can be found in the statements and affidavits from [name removed]and [name removed], the affidavit by [name removed] and the statement of [name removed]. There is information in the additional material provided directly to the Registrar (which remains confidential) about traditional laws and customs concerned holding of land as a result of descent from apical ancestors that have continued to be acknowledged and observed over the period since European settlement of the region.

[58] There is information that apical ancestors of the claim group and the inter-generational passing of law and custom from these persons to current claimants. The information I have reviewed provides specific and detailed information about asserted traditional laws and customs relating to country, ceremonial life, stories about spirits and smoking customs to stay safe from their evil intent, hunting and fishing passed down by the apical ancestors to their children and grandchildren and then from those persons to contemporary claimants.

[59] In light of the information in the application, the additional material provided directly to the Registrar (which remains confidential) and the statements and affidavits from the members of the claim group, I am also satisfied that the factual basis is sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Decision on prima facie case: s 190B(6)

31 See *Gudjala (2007)* at [82] and *Gudjala FC* at [96].

[60] The claim meets the requirements of s 190B(6) as I consider that, prima facie, at least some of the claimed native title rights and interests can be established. My reasons now follow.

What is needed to meet s 190B(6)?

[61] To meet s 190B(6), there must be some substance to the material before the Registrar to show on a prima facie basis that some of the claimed native title rights and interests can be established. The case law guides the Registrar in relation to this condition:

(a) it requires some measure of the material available in support of the claim;[32]

(b) although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);[33]

(c) s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed;[34]

(d) the use of the term 'prima facie' in s 190B(6) means that 'if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis'.

Are some of the claimed rights and interests prima facie established?

[62] I consider that the non-exclusive rights described in paragraph 4 of Schedule E can be established on a prima facie basis. These are the rights to:

(a) have access to, remain on and use the land and waters;

(b) access and take the resources of the land and waters; and

(c) protect places, areas and things of traditional significance on the land and waters.

[63] There is evidence of the claim group's previous and continuing access under the traditional laws and customs of their ancestors with the area covered by the application. There is evidence of the inter-generational transmission of these laws and customs relating to the use of the land and its resources.

[64] [name removed]provides an illustration of this in both his statement from attachment F2 of the application and in his later affidavit dated 14 April 2016:

(a) He has spent his life close to the Murray River riverine lands of his ancestors;

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32 *Northern Territory v Doepel* at [126].
33 *Northern Territory v Doepel* at [127].
34 *Northern Territory v Doepel* at [132].

(b) Growing up he was always around the old people, who passed on a great deal of knowledge about the traditional laws and customs of his ancestors, hunting, fishing and roaming around the bush.

(c) He takes his country in the claim area from [names removed], acquiring native title rights through descent from these ancestors. He took country this way from his mother and was taught about the country by his mother's brother. He does not need permission to go onto his country, although he does if entering another group's country.

(d) His country extends away from the river to the south through the Murray Sunset National park area down to the Mallee Highway. When the white people came, it was safer down there then along the river. The old people would hide there and also use it for ceremony and hunting.

(e) [name removed]has spend plenty of time in that country, camping and hunting there and learning about it from his mother's brothers. He learnt to hunt kangaroo and possum and trade possum skins. He would travel all over it hunting for weeks at a time.

(f) [name removed]takes kids out on country to teach them the laws and customs he learnt from his Uncles, such as important sites and gathering of food.

(g) One really important place in the claim area is Ned's Corner on the river and they go there regularly to hunt, fish and camp out there.

(h) They have called this claim the First Peoples of the Millewa-Mallee. Although there were individual tribes within the area, [name removed]says that they are all one mob now, descended from the ancestors, with different laws and customs from people up and down the river outside their claim boundaries.

(i) He learnt to partake in special smoking ceremonies, to guard against the spirits that inhabit certain places and to also smoke oneself and fishing lines when fishing on country.

(j) [name removed]describes the best time to catch Murray Cod when there is a new moon. He learnt this from his elders. He also learnt to trap and skin river rats and the special places where turtle eggs could be found. He learnt to hunt for swan eggs during April to September and how to work out which ones could be eaten. If no eggs had been laid, he learnt that meant a big flood was coming. He learnt to hunt the swans themselves.

(k) [name removed]provides a lot of information about hunting and fishing practices on the river and adjoining mallee lands of the Murray Sunset national park. He was taught to look after these places, including hunting and fishing grounds and midden sites.

[65] The information from other claim group members, [name removed], [name removed] and [name removed], is of a similar quality in illustrating the inter-generational transmission of law and custom giving rise to the claimed rights and interests. Based on this information, I consider that the non-exclusive rights relating to accessing the application area, accessing its resources and protecting its significant areas are established on a prima facie basis. This material shows a history of access that dates back to the times of the early settlers and the apical ancestors of the claim group. There is information to show that the access to and use of the area and its resources are subject to laws and customs that have a traditional quality. There is also information that the claim group camp and visit the area to access, teach about and protect its significant sites.

[66] I do not consider that the exclusive right of possession, occupation, use and enjoyment as can be established. I have relied on decisions of the Full Court in *Griffiths v Northern Territory* (2007) 243 ALR 7 (*Griffiths*) and *Banjima People v State of Western Australia (No 2)* [2015] FCAFC 171 (*Banjima*) which indicate that this right, to be established, must be accompanied by evidence that the practice of seeking permission to go onto another's country is grounded in a spiritual imperative that gives the practice normative force. This may be expressed by way of 'spiritual sanction visited upon unauthorised entry' and as the 'gatekeepers for the purpose of preventing harm and avoiding injury to country'.[35] In the more recent case of *Banjima*, the Full Court referred to these statements from *Griffiths* and held that 'controlling access to country, expressed by the need to obtain permission to enter under pain of spiritual sanction ... is readily recognisable as a right of exclusive possession.'[36] I do not find that there is any information in the materials I have reviewed to establish such a right of exclusive possession, occupation, use and enjoyment.

Decision on traditional physical connection: s 190B(7)

[67] The claim meets the requirements of s 190B(7) as I am satisfied that there are members of the native title claim group who currently have or previously had a traditional physical connection with any part of the land or waters covered by the application. My reasons now follow.

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

[68] The case law on this condition provides the following guidance:

35 *Griffiths FFC* at [127].

36 *Banjima FFC* at [38].

(a) 'It does require the Registrar to be satisfied of a particular fact or particular facts' and 'some evidentiary material to be presented to the Registrar'.

(b) However the focus is confined and not 'the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area'.[37]

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

[69] I am satisfied that [name removed], [name removed], [name removed]and [name removed]are members of the claim group and currently have a traditional physical connection with the area covered by the application. The evidence they have provided evinces an enduring association with the application area through visiting there and learning about their country from their predecessors. The evidences shows that they hunt, camps and fish there and interact with the country of their ancestors in traditional ways.

Decision on no failure to comply with s 61A: s 190B(8)

[70] The claim meets the requirements of s 190B(8) as I am satisfied that the application and accompanying documents do not disclose and I am not otherwise be aware that, because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made. My reasons now follow.

What is needed to meet s 190B(8)?

[71] To meet s 190B(8), the 'application and accompanying documents must not disclose and the Registrar must not otherwise be aware that, because of s 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.'

[72] I have formed the opinion that there is nothing before me to indicate that the application should not have been made because of s 61A. This section provides that applications must not be made:

(a) over areas already covered by an approved determination of native title.[38]

(b) over areas where a previous exclusive possession act attributable to the Commonwealth or a State or Territory was done.[39]

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37 *Northern Territory v Doepel* at [17].

38 See subsection 61A(1).

39 See subsection 61A(2).

(c) which claim exclusive possession, occupation, use and enjoyment in relation to areas where a previous non-exclusive possession act was done and is attributable to the Commonwealth or a State or Territory.[40]

[73] I am satisfied that there is no prohibition against the claim under this condition:

(a) a search has revealed that there are no approved native title determinations over the application area, thus meeting s 61A(1);

(b) schedule B expressly excludes any such areas covered by a previous exclusive possession act, thus meeting s 61A(2);

(c) schedule E expressly states that there is no claim to a right of exclusive possession occupation use and enjoyment where there has been no extinguishment of such a right by a previous non-exclusive possession act, thus meeting s 61A(3)

Decision on no extinguishment etc. of claimed native title: s 190B(9)

[74] The claim meets the requirements of s 190B(9) as I am satisfied that the application and accompanying documents do not disclose and I am not otherwise aware, that:

(a) to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;

(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation the whole or part of the offshore place;

(c) in any case, the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be

[75] This is because:

(a) Schedule Q of the application states that there is no claim to ownership of minerals, petroleum or gas wholly owned by the Crown;

(b) the application area does not extend to any offshore places;

(c) there is no information before me to indicate that the native title rights and interests claimed have been otherwise extinguished.

Conditions about procedural and other matters: s 190C(1)

[40] See subsection 61A(3).

Prescribed information and accompanying affidavit: s 190C(2)

What is required to meet this condition?

[76] To meet s 190C(2), the 'Registrar must be satisfied that the application contains all of the details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

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

[77] The claim meets this condition because it does contain the prescribed details and other information and is accompanied by the prescribed affidavit prescribed by ss 61 and 62, as set out below.

Applications that may be made: s 61(1)

[78] This section provides that a native title determination application may be made by 'a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group'.

[79] In my view, the limited circumstances which may permit the Registrar to assess the details provided in Schedule A as to the identity of the claim group do not arise in this case as there is nothing on the face of the application to indicate that 'not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group'—see *Northern Territory v Doepel* at [36].

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

[80] This information is provided on the first and final pages of the Form 1 application.

Applications authorised by persons: s 61(4)

[81] This section provides that a 'native title determination application that persons in a native title claim group authorise the applicant to make must: (a) name the persons; or (b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons'. Dowsett J held that the task here is merely to assess that the persons are named or a description provided and whether those details are sufficient is the task of the corresponding merit condition in s 190B(3).[41] Schedule A contains a description of the persons in the native title claim group and thus contains the information required by s 61(4).

Application accompanied by applicant's affidavit: s62(1)(a)

[82] This section provides that a claimant application must be accompanied by an affidavit made by the applicant which says the things set out in subsections (i) to (v). When providing a

41 See *Gudjala 2007* at [31] and [32].

copy of the amended application to the Registrar, the Federal Court also provided the Registrar with copies of affidavits affirmed and signed by the four persons who comprise the applicant, Rex Harradine, Janine Wilson, Norm Wilson Snr and Darren Perry.

[83] There are some deficiencies to the witnessing of the signing of the affidavits:

(a) although the witness has signed both the first and second page of each affidavit, he does not state his qualification to act as a witness on any of the affidavits. The witness has not stated his name on the second page of the affidavits by [name removed], [name removed]and [name removed]. However the witness of all affidavits seems to be [name removed], a legal practitioner employed at NTSV. As such, it would seem that there is no issue with his ability to act as a witness;

(b) the witness has not identified on the second page of the affidavits by [name removed], [name removed]and [name removed]the date he witnessed the signing of those affidavits. However, I note that the first page of each affidavit identifies a type-written date of 23 May 2015.

[84] I have decided that this is not something that the Registrar is empowered to take issue with in light of the fact that the Federal Court accepted the affidavits notwithstanding the defects in the manner of witnessing. The Court may well have done this because the defects are overall of a minor nature.

[85] I have therefore restricted my consideration to the question of whether the affidavits contain the information set out in s 62(1)(a)(i) to (v). I find that the affidavits meet the five requirements of subsections (i) to (v). This is because each affidavit:

(a) states the deponent's belief that the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, thus meeting subsection (i);

(b) states the deponent's belief that none of the area is also covered by an approved determination of native title, thus meeting subsection (ii);

(c) states their belief that all of the statements in the application are true, thus meeting subsection (iii);

(d) states that the deponent is are authorised by all the persons in the native title claim group to make the application and deal with matters in relation to it, thus meeting subsection (iv); and

(e) sets out 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. The asserted decision-making process is said to be one that was agreed and adopted at a meeting of the native title claim group in Mildura on 23 May 2015

where each family group of the native title claim group had one vote.[42] This meets the requirements of subsection (v).

[86] I note that the only task for the Registrar is to check that an affidavit or affidavits by the applicant accompanies the application and that the affidavit does the things identified in subsections (i) to (v). My task here does not involve interrogating whether or not the applicant is in fact authorised.[43]

[87] I find that the affidavits have all been signed in the presence of a witness, albeit there are some technical defects in the way the witness has attested to this fact. I find that the affidavits contain the five statements required by subsections (i) to (v). Therefore, I am satisfied under s 190C(2) that the application is accompanied by the required affidavit required by s 62(1)(a).

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

[88] The required details are in Schedule B, Attachment B and a map showing the boundaries is in Attachment C.

Details of searches of any non-native title rights and interests: s 62(2)(c)

[89] Schedule D states that there are no searches.

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

[90] Schedule E contains a description of the claimed native title rights and interests. See my reasons above at s 190B(4) which analyses the adequacy of the description and finds it be sufficient to allow the rights claimed to be readily identified. It follows that the description does not consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

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

[91] This description is provided in Schedule F and further information is provided in Attachment F. My analysis of this information appears in my reasons above at s 190B(5), from which it is clear that the description provided is sufficient for the purposes of this procedural condition.

Activities: s 62(2)(f)

[92] These details are contained in Schedule G.

Other applications: s 62(2)(g)

[93] Schedule H refers to two earlier applications that have been struck out and also states that there are no other applications in relation to the area covered by the application.

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42 See para 6 of each of the affidavits by Rex Harradine, Janine Wilson, Norm Wilson Snr and Darren Perry.

43 See *Northern Territory v Doepel* at [87].

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

[94] Schedules HA and I state that the applicant is not aware of any future act notices in relation to the area covered by the application.

Summary of decision

[95] The application contains all of the details and information prescribed by ss 61 and 62 and is accompanied by the one prescribed document, being an affidavit by the applicant. It follows that the claim satisfies the condition of s 190C(2).

No common claimants in previous overlapping applications: s 190C(3)

[96] To meet s 190C(3), the Registrar 'must be satisfied that no person included in the native title claim group for the application (the ***current application***[44]) 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 of Native Title Claims 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.

[97] A search of the application area against the Register of Native Title Claims[45] reveals that there are no previously registered applications that overlap the area of the application, such that there is no requirement for me to consider the issue of common members.

[98] Therefore, I find that the claim satisfies the condition of s 190C(3).

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

What is required to meet this condition?

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

(a) the application has been certified by all representative Aboriginal/Torres Strait Islander bodies that could certify the application in performing its functions; or

(b) where there is no certification, that the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Is the application accompanied by a certificate from all representative bodies that could certify?

[100] The applicant relies on the first limb of s 190C(4)(a), being the written certification by the only representative body for the application area, Native Title Services Victoria Ltd, contained in

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44 Emphasis in original.

45 See Geospatial overlaps analysis dated 14 October 2015.

Attachment R/R1 of the application. The certificate by NTSV is dated 7 October 2015 and has been signed by [name removed], NTSV chief executive officer. NTSV is the only representative body for the entire area covered by the application.[46] Accordingly, the question is whether the certificate contained in the application complies with the three requirements for a valid certification which are set out in s 203BE(4)(a) to (c).

Does the certificate include a statement that the representative body is of the opinion that requirements of s 203BE(2) have been met?

[101] This is the requirement of s 203BE(4)(a). Subsection 203BE(2)(a) and (b) provides that a representative body must not certify an application for a determination of native title unless it is of the opinion that: (a) all the persons in the native title 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 native title claim group.

[102] The certificate contains a statement of NTSV's opinion in the terms of s 203BE(2)(a) and (b),[47] thus meeting the requirements of s 203BE(4)(a).

Does the certificate briefly set out the body's reasons for being of this opinion?

[103] This is the requirement of s 203BE(4)(b).

[104] As to the opinion held by NTSV that the applicant is authorised,[48] the certificate states that:

(a) NTSV staff attended a meeting on 23 May 2015 in Mildura at which a unanimous decision to authorise the applicant was made after discussion and consideration by the Central Murray Riverine society people who attended the meeting;

(b) a decision was also made at that meeting that the decision-making process to be used there was that each family would have one vote to be exercised by the family group representative nominated for the purpose; and

(c) In light of these two matters, NTSV is of the opinion that the appropriate decision-making process for the purposes of authorisation pursuant to s 251B of the Act has taken place.[49]

[105] As to the opinion held by NTSV that that all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group,[50] the certificate states that:

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46 See Geospatial overlap analysis dated 14 October 2015.

47 See para 1 of the certificate.

48 See the requirements of s 203BE(2)(a).

49 See paras 3 to 5 of the certificate.

50 See the requirements of s 203BE(2)(b).

(a) NTSV has undertaken anthropological and genealogical research over a number of years and has also undertaken community consultations with members of the Central Murray Riverine society native title claim group with the purposes of identifying persons who hold native title within an area that includes the application area;

(b) members of the Central Murray Riverine society from around North West Victoria, from other parts of the state and also from interstate were in attendance at the authorisation meeting on 23 May 2015;

(c) NTSV broadly notified the authorisation meeting with public notices placed in a number of newspapers circulating in the region and the national Koori Mail;

(d) those members of the Central Murray Riverine society at the meeting agreed that there were sufficiently representative of their society to make a decision on behalf of that society;

(e) For the above reasons, NTSV's opinion is that all persons who hold native title rights and interests in the application area have been identified.[51]

[106] I note that Mansfield J held that where the application has been certified the only task for the Registrar under s 190C(4) is to be 'satisfied about the fact of certification by an appropriate representative body'.[52] There is no role for the Registrar to interrogate the brief setting out of the representative body's reasons for being of the opinions set out in s 203BE(2).[53] I find that the statements in the certificate referred to above constitute a brief setting out of the reasons for NTSV holding the required opinion. This meets the requirements of s 203BE(4)(b).

Where applicable, does the certificate briefly set out what the representative body has done to meet the requirements of s 203BE(3)?

[107] This requirement is set out in s 203BE(4)(c). Subsection 203BE(3) stipulates that if the representative body is aware that the application area is covered by one or more applications, including proposed applications, it must make all reasonable efforts to achieve agreement between the various or proposed claimants and to minimise the number of applications covering the land or waters in the application area. The question for me is whether the certificate in this case complies with subsection (4)(c), given that it does not contain any statements about what representative body has done to meet subsection (3).

[108] I have decided that a failure to provide information at 203BE(4)(c) does not invalidate the certification. In so deciding, I have had regard to the provisions of s 203BE as a whole, particularly the concluding statement in subsection (3) that a failure by the representative body to comply with it does not invalidate any certification of the application by the representative body.

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51 See paras 6 to 9 of the certificate.

52 See *Northern Territory v Doepel* at [78].

53 *Northern Territory v Doepel* at [79].

I have also had regard to the purpose of s 190C(4) and the limited nature of the enquiry for the Registrar if the applicant relies on a certification of the application by the representative body. Taking a broad view in this instance seems preferable to a narrow reading of the relevant requirement in subsection (4)(c).

Summary of decision

[109] To conclude, I am satisfied that the application has been certified by the representative body for the area it covers because there is a written certification contained in Attachment R of the application from the one representative body that exists for the area. This certificate does the things set out in subsections (4)(a) and (b). Although the certification does not do the thing set out in subsection (4)(c), I have taken the view that this does not invalidate the certification, given the statement to this effect in subsection (3).