National Native Title Tribunal

Registration Decision

Application name	First Peoples of the Millewa-Mallee Claim
Name of applicant	Casey Arden, Shane Jones Snr, Robert Baxter, LeRoy Badenoch, Mark Grist, Nyawi Black, Timothy Johnson, Nathan Giles, Andrea Giles
Federal Court of Australia No.	VID630/2015
NNTT No.	VC2015/001
Date of Decision	17 October 2024

Claim accepted for registration

I have decided that the claim in the First Peoples of the Millewa-Mallee Claim application satisfies all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).[1] Therefore the claim must be accepted for registration and entered on the Register of Native Title Claims.

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

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

Reasons for Decision

Cases cited

Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal [2012] FCA 1215; (2012) 297 ALR 660 (‘*Anderson*’)

Aplin on behalf of the Waanyi Peoples v Queensland [2010] FCA 625 (‘*Aplin*’)

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

Fortescue Metals Group v Warrie on behalf of the Yindjibarndi People [2019] FCAFC 177; (2019) 273 FCR 350 (‘*Warrie*’)

Griffiths v Northern Territory of Australia [2007] FCAFC 178; (2007) 165 FCR 391 (‘*Griffiths*’)

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 (‘*Gudjala 2007*’)

Gudjala People # 2 v Native Title Registrar [2008] FCAFC 157; (2008) 171 FCR 317 (‘*Gudjala FC*’)

Gudjala People #2 v Native Title Registrar [2009] FCA 1572; (2009) 182 FCR 63 (‘*Gudjala 2009*’)

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

McLennan v Queensland [2019] FCA 1969 (‘*McLennan*’)

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

Northern Land Council v Quall [2020] HCA 33; (2020) 271 CLR 394 (‘*Quall HC*’)

Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group [2005] FCAFC 135; (2005) 145 FCR 442 (‘*Alyawarr*’)

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

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

Sampi v Western Australia [2005] FCA 777 (‘*Sampi*’)

Sampi on behalf of the Bardi and Jawi People v Western Australia [2010] FCAFC 26; (2010) 266 ALR 537 (‘*Sampi FC*’)

Strickland v Native Title Registrar [1999] FCA 1530; (1999) 168 ALR 242 (‘*Strickland*’)

Turner v South Australia [2011] FCA 1312 (‘*Turner*’)

Wakaman People # 2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198; (2006) 155 FCR 107 (‘*Wakaman*’)

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

Western Australia v Strickland [2000] FCA 652; (2000) 99 FCR 33 (‘*Strickland FC*’)

Western Australia v Ward [2002] HCA 28; (2002) 213 CLR 1 (‘*Ward HC*’)

Background

[1] This decision relates to an amended application filed on behalf of the First Peoples of the Millewa-Mallee Claim native title claim group ('Millewa-Mallee Claim'). It covers land and waters of approximately 7860 square kilometres in the north-western corner of Victoria along the Murray River, extending about 65 kilometres south from the river and east from the South Australian border to encompass the regional city of Mildura.

[2] The claim was first filed on 8 October 2015 and was accepted for registration on the Register of Native Title Claims ('Register') on 13 May 2016. The claim has remained on the Register since that date and was amended once previously on 18 December 2020. On 17 July 2024 orders were made by a registrar of the Court replacing the applicant under s 66B and granting leave for an amended application to be filed.[2] A further amended claim was filed on 18 July 2024 ('amended application'). The Registrar of the Federal Court ('Court') gave a copy of the amended application and accompanying affidavits to the Native Title Registrar ('Registrar') on 23 July 2023 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A.[3]

Preliminary considerations

Does the registration test apply to the amended application?

[3] Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which the Act refers to as dealing mainly with the merits of the claim) and s 190C (which the Act refers to as dealing with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B–190C.

[4] Section 190A(1A) provides for exemption from the registration test for certain applications amended under s 87A. As the granting of leave by the Court to amend the application was not made pursuant to s 87A, I am satisfied that s 190A(1A) does not apply to the amended application.

[5] Section 190A(6A) sets out the conditions under which the Registrar must accept an amended application for registration without testing under ss 190B and 190C. The amendments that have been made to the amended application include the following:

- amending the composition of the persons who jointly comprise the applicant;
- amending the description of the native title claim group;
- changes to Schedule F and a replacement Attachment F as a result of the amendments to the claim group description;
- an updated Schedule I recording details of a notice given under s 29;

[2] Orders of Registrar Daniel in *First Peoples of the Millewa-Mallee Native Title Claim Group v Victoria & Ors* (Federal Court of Australia, VID630/2015, 17 July 2024.

[3] Section 190A(1).

- amendments to Schedule J and the consequential removal of Attachment J;
- Attachment R has been replaced with a new certification;
- replacing the affidavits provided for the purpose of s 62 with those of the persons comprising the newly authorised applicant at Attachment T;
- updating the contact details of the legal representative of the applicant; and
- other minor consequential amendments and typographical corrections.

[6] I am satisfied that 190A(6A) does not apply because the amended application includes amendments that do not meet the conditions set out at s 190A(6A)(d)(i)–(v). As such, the amended application must be assessed under each of the provisions of ss 190B and 190C ('registration test').

[7] I have decided that the claim in the application must be accepted for registration and this document sets out my reasons for that decision.

Procedural fairness

[8] On 30 July 2024 a Senior Officer of the NNTT wrote to both the applicant and the State of Victoria ('State') to advise that a delegate had formed the view that the exceptions in ss 190A(1A) and (6A) did not apply to the amended application and therefore the registration test would apply. The applicant was invited to provide any information that the applicant wished to be considered in addition to the application and accompanying documents to the NNTT by 16 August 2024. The State was invited to provide any submissions on the application of the registration test by 16 August 2024.

[9] On 2 August 2024 the State confirmed that it did not intend to provide any submissions.

[10] On 12 August 2024 the applicant requested, and was granted, an extension of time to 30 August 2024 in which to provide further material. The applicant's further material was then provided on 30 August and 4 September 2024 (as set out at paragraph 14 below). On 6 September 2024 this material was provided to the State for their comment by 19 September 2024.

[11] On 21 August 2024 the NNTT was copied into correspondence sent to the legal representatives of the applicant (First Nations Legal and Research Services ('FNLRS')) by a third-party in relation to the Millewa-Mallee Claim. On the same date, a Senior Officer of the NNTT wrote to the applicant to advise that should the applicant wish to comment on the third-party correspondence, any response should be provided by 4 September 2024. On 4 September 2024 the applicant provided brief comments in relation to the third-party correspondence. I refer to this below at paragraph 17.

[12] The State did not provide any response in relation to the applicant's additional material. As no further material was received, this concluded the procedural fairness process.

Information considered

[13] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar 'may have regard to such other information as he or she considers appropriate'.

[14] In accordance with s 190A(3)(a), I have had regard to the information in the amended application and the following information provided by the applicant:

on 30 August 2024:

1. Applicant's Submission on Registration ('Applicant's Submissions');
2. Statement of [claim group member 1] dated 2 October 2015;
3. Statement of [claim group member 2] dated 29 August 2024; and
4. Map of the claim area with grid lines;

and on 4 September 2024:

5. Statement of [claim group member 3] dated 4 September 2024

(together referred to 'Applicant's Additional Material').

[15] I note there is no information before me obtained as a result of any searches conducted by the Registrar of State or Commonwealth interest registers that I must have regard to in accordance with s 190A(3)(b).

[16] As set out above, there are no submissions or information provided by the State in relation to the application of the registration test that I must have regard to in accordance with s 190A(3)(c).

[17] Section 190A(3) provides that I may also have regard to such other information as I consider appropriate. As noted above, material was received from a third-party on 21 August 2024. In determining whether I consider it appropriate to have regard to third-party material under s 190A(3), I note the comments of O'Loughlin J in *Risk*, that I must first examine the contents of the material before forming an opinion as to whether it is appropriate to have regard to them.[4] The third-party correspondence is from a Ngintait Elder, seeking to withdraw from the Millewa-Mallee Claim and objecting to the use of any evidence provided by that Ngintait Elder for the purpose of the claim. The applicant's comments provided on 4 September 2024 in relation to this third-party material are to the effect that the third-party correspondence was not provided for the purpose of the registration test, does not relate to any conditions of the registration test, and that the Applicant's Additional Material does not include any material provided by the third-party Ngintait Elder. I have reviewed the amended application and the Applicant's Additional Material and am satisfied that there is no material provided by the third-party Ngintait Elder that is sought to be relied upon by the applicant for the purpose of the registration test. Having regard to the above, I have formed the opinion that it is not appropriate to have regard to the third-party material for the purpose of the registration test under s 190A(3).

[4] *Risk* [25].

[18] I have also considered information contained in a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services in relation to the area covered by the amended application, dated 1 August 2024 ('Geospatial Assessment').

Section 190C: conditions about procedural and other matters — conditions met

Section 190C(2) and ss 61 and 62: conditions about procedural and other matters – condition met

[19] I have examined the amended application and for the reasons set out below, I am satisfied that it contains all details and other information and is accompanied by affidavits and other documents as required by ss 61 and 62.

[20] To meet s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61–62. This condition does not require any merit assessment of the material to be undertaken, however it does seek '…to ensure that the application contains "all details" required by s 61…'.[5] As such, in my view s 190C(2) requires consideration of whether the amended application contains the required material and whether such material is sufficient to enable the Registrar to form an opinion about whether the claim satisfies all of the conditions in ss 190B and 190C.[6]

Section 61 – native title applications

[21] **Section 61(1)** provides that only persons included in and authorised by the native title claim group may make a native title determination application for the particular native title claimed. Nine persons are named in the amended application as comprising the applicant. Schedule A contains a description of the native title claim group. Each of the persons comprising the applicant have deposed an affidavit for the purposes of s 62 and these are annexed to the amended application at Attachment T (referred to as Schedule T) ('Applicant Affidavits'). The Applicant Affidavits indicate that each deponent is a member of the native title claim group and is authorised to make the amended application by the persons in the native title claim group.[7] Having regard to the material contained in Schedule A and the Applicant Affidavits, I am satisfied that the amended application has been made in accordance with s 61(1).

[22] **Section 61(2)** provides that the persons authorised to make the native title determination application are jointly the applicant and none of the other members of the native title claim group is the applicant. I consider that there is nothing in the amended application or other material that I have considered that suggests otherwise.

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[5] *Doepel* [35].

[6] See also s 190D(3)(b).

[7] Form 1, Attachment T, Applicant Affidavits [1], [6].

[23] **Section 61(3)** requires an application to state the name and address for service of the applicant. The names of each of the persons comprising the applicant are stated in the amended application and Part B states that the applicant is represented by FNLRS and includes the address for service. As such, I am satisfied that the amended application contains the information required by s 61(3).

[24] **Section 61(4)** requires a native title determination application authorised by persons in a native title claim group to name or describe the persons in that claim group so that it can be ascertained whether any particular person is one of those persons. In *Gudjala 2007*, Dowsett J emphasised the procedural nature of the exercise undertaken by a delegate under s 190C(2) regarding the details and information required by ss 61 and 62 in contrast to the merits exercise undertaken pursuant to s 190B(3).[8] Schedule A of the amended application contains a description of the claim group. I am satisfied that the amended application contains the information required by s 61(4) because Schedule A contains a description of the native title claim group that is sufficiently clear so that it can be ascertained whether any particular person is one of those persons.[9]

[25] **Section 61(5)** provides that the application must be filed in the Court in a manner as prescribed and be accompanied by any prescribed fee. In my view, these are matters for the Court however I note that the amended application is made in the prescribed form and was accepted for filing by the Court on 23 July 2024.

Section 62(1), (1A) and (2): information etc. in relation to certain applications; claimant applications

[26] **Section 62(1)(a)** requires a claimant application to be accompanied by an affidavit sworn by the applicant stating each of the matters mentioned in subsection (1A). As noted above, each of the persons comprising the applicant has deposed an affidavit for the purpose of s 62 (the Applicant Affidavits). These affidavits are in substantially identical terms, and include statements to the effect that:

- the deponent is a member of the native title claim group and is authorised to make the affidavit;
- the deponent attended an authorisation meeting of the claim group held on 2 June 2024 at Mildura;
- a decision-making process was agreed and adopted at the authorisation meeting, comprising a voting process where each member of the claim group has one vote and decisions are made on a majority vote;
- resolutions were passed in accordance with the decision-making process authorising each of the members of the applicant as replacement applicants under s 66B and to make the amended application and deal with matters arising in relation to it, subject to:

[8] *Gudjala 2007* [31]–[32].

[9] Section 61(4)(b).

    - the deponent providing the necessary affidavit; and
    - remaining willing and able to act as a member of the applicant;
- the authority of the applicant is also subject to a condition that the applicant must regularly consult with the native title claim group, including prior to the making of important decisions about the claim;
- the deponent believes that the native title rights and interests claimed have not been extinguished in relation to any part of the area covered by the amended application;
- the deponent believes that none of the area covered by the amended application is also covered by an approved determination of native title; and
- the deponent believes that all of the statements made in the amended application are true.

[27] I am satisfied that the above statements in the Applicant Affidavits meet the description of each of the statements required by s 62(1A)(a)–(e), noting that because a condition was imposed s 62(1A)(f) is not applicable. Where conditions are imposed on the authority of the applicant, s 62(1A)(g) also requires the affidavits to state that the conditions have been satisfied and how they have been satisfied. Although the affidavits do not contain an express statement that meets the description of s 62(1A)(g), having regard to the nature of the condition imposed (that applicant must consult with the claim group before making important decisions) and the information in the affidavit about the authorisation meeting, I am satisfied that the affidavits, read as a whole, contain the information required by s 62(1A)(g). Although not expressed as a condition on authority, the affidavits also indicate that each member of the applicant must provide the affidavit and remain willing and able to act as a member of the applicant. I am also satisfied that the affidavits, read as a whole, indicate that this has been met. I am therefore satisfied that the amended application is accompanied by the documents required by s 62(1)(a).

[28] **Section 62(1)(d)** applies where an agreement has been entered into under s 47C and requires a copy of any relevant agreement to accompany the application. There is nothing in the amended application to indicate that any agreement under s 47C has been entered into in relation to the area covered by the amended application. As such, the requirement at s 62(1)(d) is not applicable.

[29] **Section 62(2)(a)** requires that the application contain information that enables the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application to be identified. Schedule B of the amended application refers to Attachment B, which contains a written description of the external boundaries of the claim area. Schedule B also describes those areas within the external boundaries that are not covered by the amended application. As such, I am satisfied that the amended application contains the information required by s 62(2)(a).

[30] **Section 62(2)(b)** requires that the application include a map showing the boundaries of the area mentioned in s 62(2)(a). Schedule C of the amended application refers to Attachment C,

which contains a map showing the external boundaries of the amended application. As such, I am satisfied that the amended application contains the information required by s 62(2)(b).

[31] **Section 62(2)(c)** requires that the application include details and results of searches of any non-native title rights and interests covered by the application. Schedule D of the amended application states that no searches have been carried out by or on behalf of members of the claim group. As no searches have been conducted, s 62(2)(c) is not applicable to the amended application.

[32] **Section 62(2)(d)** requires an application to contain a description of the native title rights claimed in relation to particular land or waters. This description must not consist merely of a statement that the native title rights and interests are all that may exist or have not been extinguished. Schedule E of the amended application contains a description of the native title rights and interests claimed in relation to the land or waters in the application area. I am satisfied that the amended application meets the requirements of s 62(2)(d) because Schedule E contains the required information.

[33] **Section 62(2)(e)** requires an application to contain a general description of the factual basis on which it is asserted that the native title rights and interests are claimed to exist. Schedule F of the amended application refers to Attachment F, which contains the relevant factual basis. As such, I am satisfied that the amended application contains the information required by s 62(2)(e).

[34] **Section 62(2)(f)** requires that if the native title claim group currently carry on any activities in relation to the land or waters claimed, details of those activities must be included in the application. Schedule G of the amended application lists the activities currently being undertaken by members of the claim group in the claim area. Schedule G also refers to Schedules E, F and M in relation to the requirement at s 62(2)(f). I am satisfied that the amended application contains the information required by s 62(2)(f).

[35] **Section 62(2)(g)** requires an application to include details of any other court applications seeking a determination of native title or native title compensation over any of the area covered by the application. Schedule H of the amended application refers to two previous applications filed by the Latji Latji and Wergaia Peoples that have been struck out and states that there are currently no other applications for a determination of native title that cover any part of the claim area. As such, I am satisfied that the amended application contains the information required by s 62(2)(g).

[36] **Section 62(2)(ga)** requires the application to include details of any s 24MD(6B)(c) notifications relevant to the claim area. Schedule HA of the amended application states that the applicant is not aware of any notices under s 24MD(6B)(c). As such, I am satisfied that the amended application contains the information required by s 62(2)(g).

[37] **Section 62(2)(h)** requires that the application include details of any s 29 notifications relevant to the claim area of which the applicant is aware. Schedule I of the amended application states that the applicant has received one notice under s 29 and provides some detail in relation to that notice. Schedule I also refers to Attachment I, which comprises a copy of the

relevant notice. As such, I am satisfied that the amended application contains the information and details required by s 62(2)(h).

[38] **Section 62(2)(i)** requires the application include details of any conditions under s 251BA on the authority of the applicant to make the application and to deal with matters arising in relation to it. The Applicant Affidavits contained at Attachment T of the amended application contain information setting out the conditions that were imposed on the authority of the applicant. As such, the amended application contains the information required by s 62(2)(i).

Conclusion on s 190C(2)

[39] As set out above, I am satisfied that the amended application contains all of the details and other information, and is accompanied by any affidavit or other document, as required by ss 61–62, and as such, the condition at s 190C(2) is met.

Section 190C(3): no previous overlapping claim group – condition met

[40] The condition at s 190C(3) requires that 'no person included in the native title claim group for the application … was a member of the native title claim group for any previous application'. Having regard to the the Explanatory Memorandum to the *Native Title Amendment Act 1998* (Cth) which inserted this provision,[10] I consider that its purpose is achieved by preventing a claim from being registered if it includes members in common with an overlapping claim that is on the Register at the time the registration test is applied.

[41] The condition at s 190C(3) only arises where there is a previous application that meets the criteria set out in subsections (a) to (c).[11] These criteria are that any previous application covers at least some of the same area, was accepted for registration under s 190A and is on the Register.

[42] The Geospatial Assessment and my own searches of the Tribunal's mapping database indicate that there is no previous application overlapping any of the area covered by the application that meets the criteria set out in s 190C(3)(a)–(c).

[43] As there are no previous applications that meet the description of sub-ss (a)–(c), s 190C(3) does not require further consideration. I am satisfied that the application does not contravene this requirement.

Section 190C(4): identity of claimed native title holders – condition met

[44] Under s 190C(4) the Registrar must be satisfied that either a certificate under s 203BE has been issued by the relevant representative Aboriginal/Torres Strait Islander body,[12] or the requirements in subsection (4AA) are met.[13] Schedule R of the amended application states that the application has been certified by FNLRS and refers to Attachment R, which contains a

[10] Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 303 [29.25].

[11] *Strickland FC* [9].

[12] Section 190C(4)(a).

[13] Section 190C(4)(b).

certification under s 203BE. As such, I must consider whether the requirements of s 190C(4)(a) have been met.

[45] Section 190C(4)(a) requires the Registrar to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit' or 'consider the correctness of the certification'.[14] As such, I understand that my task is to identify the appropriate representative body and be satisfied that the application is certified in accordance with s 203BE.

Does the certifying body have power to certify?

[46] The Geospatial Assessment indicates that FNLRS is the relevant representative Aboriginal/Torres Strait Islander body responsible for the land and waters covered by the Millewa-Mallee Claim. Paragraph 1 of the certification at Attachment R indicates that FNLRS have certified the amended application under s 203BE(1) of the Act. The certificate is signed by the Chief Executive Officer of FNLRS. I understand that a Chief Executive Officer may perform the functions of a representative body under an instrument of delegation or as an agent.[15]

[47] Having regard to the above, I am satisfied that FNLRS is the relevant representative body for the area covered by the amended application and that it was within its power to issue the certification.

Have the requirements of s 203BE been met?

[48] To meet the requirements of s 190C(4)(a), the certification must comply with the provisions of s 203BE(4)(a) to (c).

[49] **Section 203BE(4)(a)** requires a certification to contain a statement of the representative body's opinion as per s 203BE(2), that all persons in the native title claim group have authorised the applicant to make the application and deal with matters in relation to it, any conditions under s 251BA on the authority that relate to the making of the application have been satisfied, and all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group. Paragraph 1(a) to (c) of the certification contain statements that meet the requirement at s 203BE(4)(a).

[50] **Section 203BE(4)(b)** requires a certification to include brief reasons for the representative body's opinion. The brief reasons are set out at paragraphs 3 to 18 of the certification. These contain the following information:

- recent procedural history and court mediation events had resulted in a meeting of the claim group on 4 May 2024 at which a change to the composition of the claim group was discussed;

[14] *Doepel* [78], [80]–[82]; see also *Wakaman* [32].

[15] *Quall HC* [48], [63] and [93].

- FNLRS have conducted anthropological and genealogical research in the relevant area over many years and considered the evidence provided by First Nations respondents to the Millewa-Mallee Claim;
- FNLRS maintain a database of persons and has a long engagement with the First Nations People of the Central Murray Riverine area;
- authorisation of the amended application occurred over two authorisation meetings, firstly of the previous claim group and secondly of the claim group as amended;
- on 8 May 2024 notice of the authorisation meetings were provided to members of the previous claim group inviting them to the first authorisation meeting;
- on 10 and 13 May 2024 notice was given to other persons comprising the proposed amendment to the claim group inviting them to the second authorisation meeting;
- the notices were published in the *Sunraysia Daily*, *Murray Pioneer*, and *Border Times* on 15 May 2024, and the *Koori Mail* on 22 May 2024;
- at the first authorisation meeting on 2 June 2024 the amendment to the claim group description was authorised by the previous claim group in accordance with the agreed and adopted decision-making process; and
- at the second authorisation meeting the claim group authorised the making of the amended application to reflect the amended claim group description and authorised the replacement applicant in accordance with the agreed and adopted decision-making process.

[51] I note that in setting out the brief reasons, the certificate also states that no conditions were imposed on the authority of the applicant. This is inconsistent with the material in the amended application which indicates that one condition was imposed (that the applicant must consult with the claim group before making important decisions). I refer to my above consideration at paragraph 27 in relation to the information in the amended application in relation to this condition. I note that the certificate does include a statement of opinion that '[a]ny conditions under section 251BA on the authority that relate to the making of the application have been satisfied'. As noted above, it is not the role of the Registrar in assessing the condition at s 190C(4)(a) to go beyond or consider the correctness of the certification.[16] Having regard to the nature of the condition and the information contained both in the amended application and the certification at Attachment R, in my view the information in the certification is sufficient to meet the requirements of s 203BE(4)(b).

[52] **Section 203BE(4)(c)** states that where applicable, a certification should briefly set out what the representative body has done to comply with s 203BE(3) (relating to achieving agreement and minimising the number of applications where the relevant area is or may be covered by an overlapping application for determination of native title). I refer to my above consideration of s 190C(3) which indicated that there are no overlapping claims in relation to the area covered by the amended application. As such, I consider that s 203BE(4)(c) does not apply to

[16] *Doepel* [78], [80]–[82]; *Wakaman* [32].

the certification. In any event, I note that s 203BE(3) sets out that a failure to comply with that provision does not invalidate a certification.

Conclusion on s 190C(4)

[53] For the above reasons, in my view the certification at Attachment R satisfies the requirements of s 203BE of the Act. As such, I am satisfied that the amended application has been properly certified under s 190C(4)(a) and therefore this condition is met.

[54] I note that once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to address the condition at s 190C(4)(b).[17]

Section 190B: conditions about the merits of the claim – conditions met

Section 190B(2): identification of area subject to native title – condition met

[55] Section 190B(2) requires the Registrar to be satisfied that the written information and map contained in the application are sufficient to identify, with reasonable certainty, the land and waters in relation to which the native title rights and interests are claimed.

[56] Attachment B of the amended application describes the application area by a metes and bounds description referencing State borders, the centrelines of the Calder Highway, roads and tracks, and coordinate points shown as decimal degrees to six decimal places. Schedule B also specifically excludes any area covered by three existing determinations of native title and sets out general exclusions from the area covered by the amended application.

[57] Attachment C of the application comprises a colour copy of an A3 map prepared by Geospatial Servicers, titled 'VID630/2015 First Peoples of the Millewa-Mallee Claim (VC2015/001)' dated 1 December 2020. The map is on a topographic background and shows the boundary of the claim area depicted by a bold blue outline, the commencement point of the written description, scalebar, northpoint, coordinate grid, location diagram and notes relating to the source, currency and datum of data used to prepare the map.

[58] The Geospatial Assessment concludes that the written description and map are consistent and identify the claim area with reasonable certainty and notes that the claim area has not been amended or reduced. I agree with the conclusion of the Geospatial Assessment and am satisfied that the written description and map contained in the amended application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land and waters. As such, the amended application meets the requirement at s 190B(2).

[17] *Doepel* [80].

Section 190B(3): identification of the native title claim group – condition met

[59] Section 190B(3) requires the Registrar to be satisfied that either the persons in the native title claim group are named in the application,[18] or that persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.[19]

[60] From the relevant case law, I understand that when assessing the requirements under s 190B(3):

- I am required to address only the content of the application;[20]
- 'only … the members of the claim group are required to be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification';[21]
- where a claim group description contains a number of paragraphs, the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open';[22] and
- to determine whether the conditions or rules specified in the application have a sufficiently clear description of the native title claim group, '[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described'.[23]

[61] The description of the native title claim group at Schedule A is as follows:

> The native title claim group on whose behalf the application is made, who are the **Native Title Holders** for the area covered by the application (which, in this Schedule A, is described as the **Determination Area**) are the persons described as follows:
>
> The Native Title Holders are those living Aboriginal people who satisfy all three of the following criteria:
>
> (a) are descended (including by adoption in accordance with traditional law and customs) from one or more of the following identified ancestors:
>
> (i) John Perry;
>
> (ii) Nelly Perry;
>
> (iii) the mother of Sarah Mayne; and
>
> (b) identify themselves as having rights and interests in the Determination Area under the traditional laws and customs applicable to the Determination Area, as:
>
> (i) Ngintait, Latji Latji or Nyeri Nyeri; and/or
>
> (ii) a member of the native title holding group; and

[18] Section 190B(3)(a).
[19] Section 190B(3)(b).
[20] *Doepel* [51]; *Gudjala 2007* [30].
[21] *Gudjala 2007* [33].
[22] Ibid [34].
[23] *WA v NTR* [67].

(c) are recognised by the Native Title Holders as having rights and interests in the Determination Area under the traditional laws and customs applicable to the Determination Area, as:

(i) Ngintait, Latji Latji or Nyeri Nyeri; and/or

(ii) a member of the native title holding group.

[62] In relation to identifying members of the claim group by descent from named apical ancestors, I note that this has been accepted by the Court as satisfying the requirements of s 190B(3)(b).[24] In my view, requiring a person to show descent from an identified ancestor provides a clear starting or external reference point and that with some factual inquiry it will be possible to identify the persons who fit this part of the description of the native title claim group.

[63] In relation to the second criteria of self-identification, the description states that this must be in accordance with traditional laws and customs and as a Ngintait, Latji Latji or Nyeri Nyeri member of the claim group. These traditional laws and customs are set out in Attachment F of the amended application and are considered below in relation to the third criteria for membership of the claim group.

[64] In relation to the third criteria of recognition by other members of the claim group, I note that group acceptance has been previously held by the Court as 'inherent in the nature of a society'.[25] In *Sampi FC*, the Full Court noted that:

> in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group – the emic view. The unity among members of the group required by *Yorta Yorta* means that they must identify as people who are bound by the one set of laws and customs or normative system.[26]

[65] I consider that this element of the claim group description involves recognition by reference to the traditional laws and customs of the Ngintait, Latji Latji or Nyeri Nyeri People. The traditional laws and customs of the claim group are set out in Attachment F of the amended application.[27] This material makes it clear that descent from one of the apical ancestors is integral to membership of the claim group, but that a person with descent connections must also regard themselves and be recognised by other members of the claim group as having rights and interests in the claim area.[28]

[66] Having regard to the description of the claim group at Schedule A as a whole, I consider that self-identification and recognition of a person as a member of the claim group is linked to the traditional laws and customs of the claim group and that this provides sufficiently clear rules and principles to ascertain whether a particular person is a member of the claim group.

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[24] *WA v NTR* [67].

[25] *Aplin* [260]; *Yorta Yorta* [108].

[26] *Sampi FC* [45].

[27] Form 1, Attachment F [18]–[24].

[28] Ibid [22].

[67] As such, I am satisfied that the description of the claim group is sufficiently clear such that, with some factual inquiry, it can be ascertained whether a particular person is a member of the claim group as required by s 190B(3). This condition is met.

Section 190B(4): identification of claimed native title – condition met

[68] Section 190B(4) requires the Registrar to be satisfied that the description contained in the application as required by s 62(2)(d) is sufficient to allow the native title rights and interests claimed to be readily identified. I understand that I am confined to the material contained in the application itself in considering this condition.[29]

[69] Justice Mansfield noted in *Doepel* that the 'test of identifiability' for the purpose of this condition is whether the description of the native title rights and interests is understandable, has meaning and is without contradiction.[30] It is also open to the Registrar to read the contents of the claimed rights and interests together with any stated qualifications or restrictions.[31] I note that a description of a native title right or interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)'.[32]

[70] The claimed rights and interests are set out in Schedule E as follows:

> **Native title where traditional rights are wholly recognisable**
>
> 1. Paragraph 2 applies to every part of the Claim Area:
>
> (a) where there has been no extinguishment to any extent of native title rights and interests or where any such extinguishment is required to be disregarded pursuant to ss 47, 47A or 47B of the NTA; and
>
> (b) which is not subject to the public right to navigate or the public right to fish.
>
> 2. Where this paragraph applies, the native title rights and interests possessed under traditional laws and customs confer possession, occupation, use and enjoyment of the land and waters as against all others.
>
> **Native title where traditional rights are partially recognisable**
>
> 3. Paragraph 4 applies to every part of the Claim Area to which paragraph 2 does not apply.
>
> 4. Where this paragraph applies, the customary rights and interests possessed under traditional laws and customs that are able to be and should be recognised by the common law of Australia being 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; and
>
> (c) protect places, areas and things of traditional significance on the land and waters.

[29] *Doepel* [16].

[30] Ibid [99], [123].

[31] Ibid [123].

[32] *Strickland* [60]. See also *Strickland FC* [85]–[87].

Area covered by the native title and who holds the rights

5. Each of the native title rights and interests referred to in each of paragraphs 2 and 4 exist in relation to the whole of each part of the Claim Area to which those paragraphs respectively apply and is held by the members of the native title claim group subject to and in accordance with traditional laws and customs.

[71] Paragraph 6 of Schedule E states that the activities in exercise of these native title rights and interests are 'all such activities as are contemplated by those rights and interests' and include those referred to in Schedule G.

[72] Paragraph 7 provides that the claimed rights and interests are subject to the laws of the Commonwealth and the State of Victoria. Paragraph 8 notes that 'resources' does not include minerals, petroleum or gas wholly owned by the Crown and paragraph 9 refers to Schedules F, G and M for more information for the purpose of ss 62(2)(d) to (f) and 190B(5) to (7).

[73] In my view, the native title rights and interests described in Schedule E of the amended application are understandable and have meaning. I have reviewed the list of activities at Schedule G and consider that the activities listed are consistent with the claimed rights and interests at Schedule E. I do not consider there to be any inherent contradictions in Schedules E or G. As such I am satisfied that the requirements of s 190B(4) are met.

[74] I consider below whether the factual basis material is sufficient to establish the existence of these claimed rights and interests on a prima facie basis under s 190B(6).

Section 190B(5): factual basis for claimed native title – condition met

[75] Section 190B(5) requires the Registrar to be satisfied that the factual basis for the claimed native title rights and interests is sufficient to support the following assertions:

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

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

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

[76] Justice Mansfield stated in *Doepel* that the task under s 190B(5):

> requires the Registrar 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… The role is not 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.[33]

[77] As such, when assessing the requirements of this condition, I understand that I must treat the asserted facts as true and assess whether they are sufficient to support each of the relevant assertions.

[33] *Doepel* [17]; *Gudjala FC* [57], [83].

[78] The guidance provided by the Full Court in *Gudjala FC* in respect of the details required under s 62(2)(e)(i) to (iii) 'general description of the factual basis on which it is asserted that the native title rights and interests claimed exist…' is also relevant to the task under s 190B(5):

> The fact that the detail specified by s 62(2)(e) is described as "a general description of the factual basis" is an important indicator of the nature and quality of the information required by s 62. In other words, it is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description 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. But what the applicant is not required to do is to provide anything more than a general description of the factual basis on which the application is based. In particular, the applicant is not required to provide evidence of the type which, if furnished in subsequent proceedings, would be required to prove all matters needed to make out the claim. The applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim.[34]

[79] In *Gudjala 2009*, Dowsett J further clarified the task under s 190B(5) as follows:

> In assessing the adequacy of a general description of the factual basis of the claim, one must be careful not to treat, as a description of that factual basis, a statement which is really only an alternative way of expressing the claim or some part thereof. In my view it would not be sufficient for an applicant to assert that the claim group's relevant laws and customs are traditional because they are derived from the laws and customs of a pre-sovereignty society, from which the claim group also claims to be descended, without any factual details concerning the pre-sovereignty society and its laws and customs relating to land and waters. Such an assertion would merely restate the claim. There must be at least an outline of the facts of the case.[35]

[80] From the above, it is my understanding that although the material provided by the applicant need not provide evidence to make out each claim, it must nevertheless provide sufficient factual details to enable a 'genuine assessment' of the factual basis for the assertions set out in ss 190B(5)(a) to (c) and at a minimum provide 'an outline of the facts of the case'.[36]

[81] The factual basis material is set out in the Attachment F and the Applicant's Additional Material. I have set out my consideration of this material under each of the assertions at s 190B(5)(a) to (c) in turn below.

Section 190B(5)(a): the association of the native title claim group and their predecessors with the area

[82] Section 190B(5)(a) was recently considered in *McLennan* by Reeves J, where his Honour set out the following relevant principles:

> To satisfy the condition in s 190B(5)(a) of the [Act], it will be sufficient if the applicant demonstrates that:

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[34] *Gudjala FC* [92].

[35] *Gudjala 2009* [29]; *Anderson* [43], [47]–[48].

[36] *Gudjala 2009* [29].

(a) "the claim group presently has an association with the area, and the claim group's predecessors have had an association with the area since sovereignty or European settlement" [*Gudjala 2007* [52]];

(b) "there is an association between the whole group and the area, although not all members must have such association at all times" [*Gudjala 2007* [52]]; and

(c) "there is an association with the entire area claimed, rather than an association with only part of it or 'very broad statements', which have no 'geographical particularity'" [*Martin* [26] and *Corunna* [39]].[37]

[83] In addition, I note the comments of Dowsett J in *Gudjala 2007* that s 190B(5)(a) requires sufficient factual material to support the assertion that the identified claim group (and not some other group) hold the identified rights and interests (and not some other rights and interests)'.[38]

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

[84] Attachment F states that the claim area was widely inhabited by Aboriginal People for millennia prior to the assertion of sovereignty, and that 'effective sovereignty' occurred in the area in the 1840s.[39] Europeans first came through the area in 1829 with the expedition of Charles Stuart, where records indicate that the expedition party came close to violence with Aboriginal people near the junction of the Murray and Darling Rivers (on the northern border of the claim area).[40] Further European impact occurred in the claim area through subsequent exploration, transportation of livestock from the late 1830s, the establishment of sheep and cattle stations from the mid-1840s and steamboats on the Murray River from 1853.[41] The presence of Aboriginal people in the area was recorded by historians, ethnographers, linguists and anthropologists.[42]

[85] The Applicant's Submissions contain further detail on the three apical ancestors listed in Schedule A. This material indicates that John Perry was born in around 1854 and Nelly Perry was born in around 1845 or 1855.[43] Tindale recorded that they had four daughters and a son, some of whom were recorded as being from Mildura, as well as a number of grandchildren.[44] The statements of members of the claim group contained in the Applicant's Additional Material indicate that John and Nelly Perry travelled up and down the Murray River and through the claim area.[45]

[86] According to oral history, the mother of Sarah Mayne was born on the claim area prior to effective sovereignty and gave birth to Sarah Mayne in around the 1840s.[46] Sarah Mayne is

[37] *McLennan* [28], citations incorporated from original.

[38] *Gudjala 2007* [39].

[39] Form 1, Attachment F [2]–[4].

[40] Ibid [5].

[41] Ibid [6].

[42] Ibid [8]–[9].

[43] Applicant's Submissions, page 4 [24].

[44] Ibid.

[45] Applicant's Additional Material, Statement of [claim group member 3] dated 4 September 2024 [10].

[46] Ibid, page 5 [26].

said to have been taken to Moolpa Station in New South Wales where she had two children in the late 1850s and early 1860s, before being 'rescued by family and taken back across the Murray River.[47] Although there are no written records relating to Sarah Mayne, her granddaughter is recorded as being born in about 1863 at Moolpa Station, having an Aboriginal mother and had eight children at Ebenezer Mission (outside of the claim area).[48]

[87] The material at Attachment F states that:

> Many members of the native title claim group, and of the predecessors of the native title claim group, were born on the Claim Area. Many members of the native title claim group, and of the predecessors of the native title claim group, live or have lived on or in the vicinity of the Claim Area in communities such as Mildura, Merbein, Lake Cullulleraine, Wentworth, Robinvale, Swan Hill, Berri and Gerard.
>
> Many predecessors of the native title claim group have been buried on the Claim Area.[49]

[88] The statements from members of the claim group include further detail about the association of the predecessors of the claim group with the claim area. [Claim group member 1] refers to living on the banks of the Murray River with her grandmother, being told that the descendants of John and Nelly Perry belong to the claim area and being taken to meet family from Mildura along the river to the South Australian border and in nearby towns.[50]

[89] [Claim group member 2] sets out his genealogical links to Sarah Mayne and describes learning about country from family, including an Uncle who would take him camping on the river and speak about the importance of the river and how their connection to Country goes back generations.[51]

[90] [Claim group member 3] also refers to his genealogical links to John and Nelly Perry and how the predecessors of the claim group knew Ngintait/Yu Yu, Keramin and Jari Jari language, only speaking it 'out bush' because the older generation had told them to avoid practicing their culture in front of Europeans.[52] [Claim group member 3] states that the old people always camped and lived on their Country,[53] and describes learning about Country from the old people:

> our country goes up and down the Murray River, right up to Chowilla in South Australia and Lake Victoria across the Murray in New South Wales. It includes Neds Corner and Lake Cullulleraine, both of which are in the [Millewa-Mallee] claim area. My grandmother also told me that when the river flooded our old people would go south into their inland country to higher ground. That inland part of the [Millewa-Mallee] claim area is part of my country too.[54]

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[47] Ibid.

[48] Ibid, page 4 [25].

[49] Form 1, Attachment F [12]–[13].

[50] Applicant's Additional Material, Statement of [claim group member 1] dated 2 October 2015 [14]–[17].

[51] Ibid, Statement of [claim group member 2] dated 29 August 2024 [2], [8].

[52] Ibid, Statement of [claim group member 3] dated 4 September 2024 [5]–[6].

[53] Ibid [11].

[54] Ibid [7] (references to the map of the claim area with grid lines contained in the Applicant's Additional Material removed).

[91] The statements from members of the claim group provide further material relating to the current association with the claim area. [Claim group member 1] describes living at Mildura and locating and protecting scar trees, advocating for the Millewa-Mallee People about managing cultural heritage, conducting Welcome to Country and smoking ceremonies and protecting culturally significant massacre sites.[55]

[92] [Claim group member 2] describes going on the claim area with his family to undertake activities including camping, hunting and fishing at Lake Cullelleraine, Bambill, Kings Billabong and Hattah Lakes (south-east of the claim area).[56] The material also refers to sites of importance in the western portion of the claim area, such as the former gathering site and burial site at Lake Wallawalla, and at Chowilla, adjacent to the area outside the north-western corner of the claim area, as an important place for the claim group for ceremony and where members of the claim group camp, fish and hunt.[57]

[93] The factual basis material also contains information about the association of members of the claim group in the southern portion of the claim area, away from the river. [Claim group member 3] refers to being told by his grandmother 'that when the river flooded our old people would go south into their inland country to higher ground' and that this is part of his country.[58] Similarly, [claim group member 1] states that the area covered by the Murray-Sunset National Park was used by the predecessors of the claim group 'for ceremonies and as an important source for food when times were tough around the river or the seasons were bad'.[59] [Claim group member 2] describes going to places further south from the river, such as Bambill and Hattah to hunt kangaroos.[60] Members of the claim group also refer to the importance of protecting artefacts and conducting smoking ceremonies in the mallee area to free people from spirits.[61]

[94] Attachment F also notes that members of the claim group were recognised in the adjoining determination in South Australia.[62]

Consideration of the assertion at s 190B(5)(a)

[95] From the above information, I consider that the factual basis material is sufficient to enable a 'genuine assessment' of the assertions that members of the claim group and their predecessors have an association with the claim area. The material demonstrates the connection that the apical ancestors had with the area, particularly along the Murray River. The material from current members of the claim area demonstrates connections with Mildura and sites in the vicinity of Mildura, along the river to the South Australian border. Although there is less detail relating to the southern portion of the claim area, there is material that

[55] Applicant's Additional Material, Statement of [claim group member 1] dated 2 October 2015 [22]–[29].

[56] Ibid, Statement of [claim group member 2] dated 29 August 2024 [10].

[57] Ibid, Statement of [claim group member 3] dated 4 September 2024 [17], [20], [12].

[58] Ibid [7].

[59] Ibid, Statement of [claim group member 1] [17].

[60] Ibid, Statement of [claim group member 2] dated 29 August 2024 [16].

[61] Ibid, Statement of [claim group member 3] dated 4 September 2024 [22].

[62] *Turner*. I note that the claim group in this determination is broader than the Millewa-Mallee Claim, although it does include descendants of two of the apical ancestors in Schedule A of the amended application (John Perry and Nellie Perry).

indicates that the predecessors would use this area as an important source of food when the river flooded, and current members of the claim group refer to hunting in this area.

[96] In my view, the factual basis material contained at Attachment F, the Applicant's Submissions and the statements from members of the claim group demonstrates that the claim group and their predecessors have an association with the entire claim area. I also consider that the factual basis material provides sufficient geographical particularity to support the assertion of an association between the whole group and the claim area.[63] As such, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(a).

Section 190B(5)(b): traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the native title rights and interests

[97] Section 190B(5)(b) requires the factual basis material to be sufficient to support the assertion of the existence of the traditional laws and customs giving rise to the native title rights and interests claimed. The definition of 'native title rights and interests' in s 223(1)(a) provides that those rights and interests must be 'possessed under the traditional laws acknowledged by, and traditional customs observed' by the native title holders.

[98] The High Court observed in *Yorta Yorta* that laws and customs are 'traditional' where:

- 'the origins and content of the law or custom concerned are to be found in the normative rules' of a society that existed prior to the assertion of British sovereignty,[64] where the society consists of a body of persons united in and by their acknowledgement and observance of a body of laws and customs;[65]
- the normative system under which those traditional rights and interests are possessed is one which 'has had a continuous existence and vitality since sovereignty';[66]
- the laws and customs have been passed from generation to generation, and must be rooted in the traditional laws and customs that existed pre-sovereignty;[67]
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty.[68]

[99] In *Gudjala 2009*, Dowsett J discussed some of the factors that may guide the Registrar in assessing the factual basis, including that:

- it is necessary for the factual basis material to identify the relevant pre-sovereignty society of persons who acknowledged and observed the laws and customs;[69]

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[63] *Gudjala 2007* [52].
[64] *Yorta Yorta* [46].
[65] Ibid [49].
[66] Ibid [47].
[67] Ibid [46], [79].
[68] Ibid [87].
[69] *Gudjala 2009* [37], [52].

- where the basis for membership of the claim group is descent from named ancestors, the factual basis material must demonstrate some relationship between the ancestors and the pre-sovereignty society from which the laws and customs are derived;[70] and
- the factual basis material must provide an explanation, beyond a mere assertion, of how the current laws and customs of the claim group are traditional and derived from the pre-sovereignty society.[71]

[100] I also note the observations of the Full Court in *Warrie*, that although

> a claim group must establish that the traditional law and custom which gives rise to their rights and interests in that land and waters stems from rules that have a normative character', the Act does not 'require establishment of some overarching "society" that can only be described in one way and with which members of a claim group are forever fixed in relation to any other land and waters over which they assert native title.[72]

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

[101] Attachment F states that the claim group is part of a society that existed at sovereignty in the Central Murray Riverine Area with traditional laws and customs of a normative character that are acknowledged and observed through kinship relationships and respect for elders and that are socially enforced.[73] The claim group is described as a single group that hold rights and interests in the claim area under the normative system of traditional laws and customs, with responsibility to care for Country as the 'right people' or 'owners' of the claim area.[74] This was also set out in the adjacent determination over the South Australian border, in which Mansfield J referred to the landholding rules and that 'the claimants' society has gone from localised small land-holding groups to a single group claiming generalised rights over the whole area'.[75]

[102] The material indicates that the traditional laws and customs include those in relation to:

(a) the responsibility to maintain connection to kin and country;

(b) country as a spiritual, sentient homeland;

(c) the use and sharing of resources, including with respect to sustainability for future generations;

(d) practices relating to death and the ongoing care and maintenance of burial sites;

(e) the passing on of knowledge from generation to generation;

(f) respect for elders, and their role in decision-making;

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[70] Ibid [40].

[71] Ibid [29], [54].

[72] *Warrie* [107]; see also *Alyawarr* [78].

[73] Form 1, Attachment F [15], [35].

[74] Ibid [25]–[26].

[75] *Turner* [33].

(g) protecting the physical and spiritual integrity of country.[76]

[103] The material at Attachment F also describes the rules by which a person holds native title rights and interests in the claim area, as reflected in the description of the claim group at Schedule A, being descent from a named applicant and self-identification and recognition under traditional laws and customs as Latji Latji, Ngintait or Nyeri Nyeri, or as a member of the claim group.[77] Members of the claim group have responsibilities under traditional laws and customs to 'look after' and protect the claim area and the significant sites, such as burial sites, depending on 'seniority, gender, ritual knowledge and authority, and whether they have a particular association with that area'.[78]

[104] Members of the claim group also describe creation stories, such as the formation of the Murray River by a serpent that came from the ocean, through the centre of Australia, weaving a line in the sand that was filled with water.[79] [Claim group member 3] describes how there are songlines that go through parts of the claim area and that the Elders know these places and 'what to look out for based on our myths and stories', such as the Mulgewanke (bunyip), and that when members of the claim group go camping they see and hear things that they were told about by the Elders.[80]

[105] The statements from members of the claim group contained in the Applicant's Additional Material contain further detail in relation to the claim group's traditional laws and customs. For example, [claim group member 1] describes the importance of smoking ceremonies as follows:

> Smoking ceremonies are important because they help purify you after you've been in contact with spirits - properly smoking yourself stops the spirits coming with you when you've been in contact with them. I get that funny feeling around massacre sites and in certain places in the bush and I always make sure that I smoke myself when I've been in places like that.[81]

[106] Smoking ceremonies are important parts of the cultural protocols that must be followed by members of the claim group as part of the responsibility to look after important sites, because 'we could get sick and dragged out of bed by spirits if we don't'.[82] Members of the claim group further describe the importance of protecting important sites on the claim area, such as massacre sites and scar trees.[83] The importance of traditional laws and customs relating to maintaining and protecting the river is described by [claim group member 2] as follows:

> I was always taught to respect the river and not neglect it. If you respect the river, it will look after you, but if you damage it, it won't look after you. We can't take too much from the river because

[76] Ibid [33].

[77] Ibid [21]–[22].

[78] Ibid [31].

[79] Applicant's Additional Material, Statement of [claim group member 2] dated 29 August 2024 [21].

[80] Ibid, Statement of [claim group member 3] dated 4 September 2024 [23]–[25].

[81] Ibid, Statement of [claim group member 1] dated 2 October 2015 [25].

[82] Ibid, Statement of [claim group member 3] dated 4 September 2024 [14], [19].

[83] Ibid, Statement of [claim group member 1] dated 2 October 2015 [26]–[28].

> it's a river for all our people, my mob. The country needs to survive, the river is life. Without the river and water, you don't have anything.[84]

[107] [Claim group member 2] also describes the importance of totems to the claim group, such as the black cockatoo, which is a flying spirit that represents freedom and health and indicates that 'everything is in sync, in harmony' when it is flying through Country.[85] [Claim group member 3] also describes the importance of other birds, for example:

> when someone dies, the willy wagtail dances to tell you, and the hawks show you where dead people and animals are located. The birds will show you signs of danger, when food is around. When the pelicans go high in the sky, it tells you a flood is coming.[86]

[108] Other animals are also culturally important, such as goannas, which are described by [claim group member 2] as spiritual creatures and that 'when the goanna climbs a tree it removes bark, which is good for the environment. It's part of the regeneration of the tree, it helps it breathe, and that's a part of our culture'.[87]

[109] The material also describes traditional practices in relation to fishing, such as knowing the best times and places to catch Murray Cod using the cycles of the moon.[88] Members of the claim group also describe using natural resources, such as 'old man weed' and other bush medicine for coughs, sores, cuts and bruises.[89]

[110] I also note that in the adjacent determination over the South Australian border, the laws and customs of that claim group (also part of the same regional society and including persons who are members of the Millewa-Mallee claim group) were found to have continued existence and vitality since sovereignty.[90] Justice Mansfield referred to the relevant material, which reflects some of the factual basis material in this claim, such as the importance of smoking ceremonies and maintaining and protecting significant sites.[91]

Consideration of the assertion at s 190B(5)(b)

[111] In my view, the factual basis material outlined above is sufficient to enable a genuine assessment of whether there exist traditional laws acknowledged and customs observed by the claim group that give rise to the claim to native title rights and interests. I consider that the factual basis material set out above from Attachment F and the statements of members of the claim group demonstrates the existence of the traditional laws and customs of the Millewa-Mallee People. The material demonstrates the importance to the claim group of maintaining their traditional laws and customs, in particular relating to respecting the spirits through conducting smoking ceremonies and beliefs in relation to totems and messenger

[84] Ibid, Statement of [claim group member 2] dated 29 August 2024 [23].
[85] Ibid [24].
[86] Ibid, Statement of [claim group member 3] dated 4 September 2024 [27].
[87] Ibid, Statement of [claim group member 2] dated 29 August 2024 [15].
[88] Ibid, Statement of [claim group member 1] dated 2 October 2015 [35].
[89] Ibid, Statement of [claim group member 3] dated 4 September 2024 [28].
[90] *Turner* [34].
[91] Ibid [32].

animals. The material also demonstrates the landholding rules and protocols through which members of the claim group derive their rights and interests in the claim area.

[112] In my view the material demonstrates that these traditional laws and customs have their origin in the society that existed in the claim area before the assertion of sovereignty. The existence of these traditional laws and customs, as part of the wider society that holds rights in the Central Murray Riverine Area, has been recognised in the adjacent determination over the South Australian border.

[113] For the above reasons, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(b) that there exist traditional laws acknowledged by, and traditional customs observed by the claim group that give rise to the claimed rights and interests.

Section 190B(5)(c): the native title claim group have continued to hold the native title in accordance with those traditional laws and customs

[114] Section 190B(5)(c) requires the factual basis material to be sufficient to support the assertion that the native title claim group continues to hold native title in accordance with traditional laws and customs. The traditional laws and customs referred to in s 190B(5)(c) are those referred to under s 190B(5)(b).[92]

[115] I understand that continuity may be inferred where there is '[c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs'.[93]

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

[116] I refer to the above material set out in my consideration of the conditions at ss 190B(5)(a) and (b). The material in Attachment F relating to this condition states that the claim group are the descendants of the apical ancestors and their predecessors and that their traditional laws and customs have been acknowledged, observed and passed down through the generations since sovereignty.[94] Attachment F states that:

> The claim group members and their predecessors have maintained a spiritual connection with the land and waters of the Claim Area, including through the telling of stories, the protection of sacred places (including burial places), interaction with spirits present in the country, the assumption of responsibility to protect and care for the Claim Area, and the continued transmission of knowledge about the country and its spirits from senior or elder members of the group to younger group members, including children.[95]

[117] The material indicates that members of the claim group have maintained a continual physical presence on the claim area, including camping, hunting, fishing and that the traditional laws

[92] *Martin* [29].

[93] *Gudjala 2009* [33].

[94] Form 1, Attachment F [36]–[38].

[95] Ibid [39].

and customs possessed by the claim group are the same as or derived from those that existed at sovereignty.[96]

[118] In addition, each of the statements of members of the claim group set out their genealogical links and include material indicating how the claim group have passed on their traditional laws and customs. [Claim group member 3] describes that although the impact of European settlement meant that storylines have been lost, some stories survived and were passed down from the old people, and that activities like camping and fishing are still done the way they have always been done, 'when no white man was around'.[97]

[119] [Claim group member 1] describes being taught by her grandmother 'about the way that people used to live and use the land and resources of the region', including specific laws and customs such as the cultural rights behind Welcomes to Country and other ceremonies.[98] This knowledge is being regularly passed on to the younger generations in the same way it was passed down by the Elders.[99] [Claim group member 1] states that:

> I pass the knowledge on to the younger generation in the same way my grandmother passed it to me. I encourage and try to take the younger ones out to cultural sites so they get a sense of the importance of continuing these practices. Passing on the knowledge to the younger ones and getting them to really carry out these practices as well I see as critically important.[100]

[120] As a further example of how members of the claim group pass on cultural knowledge to the younger generations, [claim group member 3] states that:

> We pass knowledge and information about our country and culture on to our kids. We go camping with the kids and they come to native title meetings with family. I teach my kids the knowledge and stories that were passed on to me by my parents, grandparents and uncles. This is important so they don't lose touch with country. ... Country needs us to look after it; we have a responsibility from our ancestors to look after it.[101]

[121] The material also demonstrates that traditional laws and customs relating to smoking ceremonies have been passed down by the older generations and continue to be passed on to the younger generations.[102] [Claim group member 3] describes the importance of respecting burial sites and that '[o]ur old people used to do this work before us and bury their old people properly. Our old people showed us and told us that it is what needs to be done'.[103]

[122] Other members of the claim group describe being taught about the importance of Country and the Murray River, where certain sites are, that the connection to that Country goes back generations and that they teach their children about Country.[104]

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[96] Ibid [40]–[42].

[97] Applicant's Additional Material, Statement of [claim group member 3] dated 4 September 2024 [13].

[98] Ibid, Statement of [claim group member 1] dated 2 October 2015 [30]–[31].

[99] Ibid [32].

[100] Ibid.

[101] Ibid, Statement of [claim group member 3] dated 4 September 2024 [16].

[102] Ibid, Statement of [claim group member 1] dated 2 October 2015 [25].

[103] Ibid, Statement of [claim group member 3] dated 4 September 2024 [14].

[104] Ibid, Statement of [claim group member 2] dated 29 August 2024 [7]–[8].

[123] In the adjacent determination, Mansfield J accepted that the system of laws and customs of the society have existed, substantially uninterrupted, since sovereignty.[105]

Consideration of the assertion at s 190B(5)(c)

[124] In my view, the factual basis material set out above contains sufficient detail to enable a genuine assessment of the extent to which the Millewa-Mallee People have continued to hold the native title in the claim area under their traditional laws and customs. The material from the statements of members of the claim group demonstrates direct genealogical links as well as the transmission of traditional laws and customs from generation to generation.

[125] Having regard to the information set out above, I consider that the factual basis material demonstrates that the traditional laws and customs possessed by the Millewa-Mallee People are the same as or are rooted in those that existed at sovereignty. In my view, the material demonstrates the genealogical links between the ancestors and predecessors of the claim group and current members of the claim group such that it can be said that the traditional laws and customs of the society at sovereignty have continued to be acknowledged and observed by the current members of the claim group.

[126] For the above reasons, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(c) the claim group have continued to hold the native title in accordance with their traditional laws and customs.

Section 190B(6): prima facie case – condition met

[127] Section 190B(6) requires the Registrar to consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.[106]

[128] I understand that I may consider material additional to the application for the purpose of my assessment of this condition.[107] Because a 'more onerous test [is] to be applied to the individual rights and interests claimed' than under s 190B(5),[108] I consider that the task involves some weighing of the factual basis for the claimed rights and interests. It follows that a claimed native title right and interest can be prima facie established if the factual basis is sufficient to demonstrate that it is possessed pursuant to the traditional laws and customs of the native title claim group.[109]

[129] In *Gudjala 2007*, Dowsett J indicated that s 190B(6) is to be considered having regard to the definition of 'native title rights and interests' in s 223(1).[110] As such, I must consider whether, on a prima facie basis, the claimed native title rights and interests:

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[105] *Turner* [33].

[106] Section 186(1)(g) of the Act requires the Register of Native Title Claims to include a description of the native title rights and interests that, in applying s 190B(6), could be established on a prima facie basis.

[107] *Doepel* [16].

[108] Ibid [127], [132].

[109] *Yorta Yorta* [86]; *Gudjala 2007* [86].

[110] *Gudjala 2007* [85]–[87].

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

[130] In *Ward HC*, Kirby J observed that 'for a native title right to be recognised under the [Act], the critical threshold question is whether it is a right or interest "in relation to" land or waters'.[111] The term "in relation to" is here to be given a 'wide import'.[112]

[131] The claimed native title rights and interests are set out at paragraph 70 above and include both exclusive and non-exclusive rights and interests. I am satisfied that each of the claimed rights and interests are 'in relation to' land and waters.

[132] I have set out my consideration under s 190B(6) of each of the claimed exclusive and non-exclusive rights and interests below.

Exclusive rights and interests

[133] Paragraphs 1 and 2 of Schedule E claim that where recognisable, the native title rights and interests possessed by the claim group 'confer possession, occupation, use and enjoyment of the land and waters as against all others'.

[134] I have had regard to the relevant case law in relation to exclusive rights and interests. In *Ward HC*, the High Court noted that exclusive rights are 'the rights under traditional law and custom to be asked permission and to "speak for country" that are expressed in common law terms as a right to possess, occupy, use and enjoy land to the exclusion of all others'.[113]

[135] The Full Court held in *Griffiths* that:

> It is not necessary to a finding of exclusivity in possession, use and occupation, that the native title claim group should assert a right to bar entry to their country on the basis that it is "their country". If control of access to country flows from spiritual necessity because of the harm that 'the country' will inflict upon unauthorised entry, that control can nevertheless support a characterisation of the native title rights and interests as exclusive. The relationship to country is essentially a 'spiritual affair'. It is also important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people. The question of exclusivity depends upon the ability of the [native title holders] effectively to exclude from their country people not of their community. If, according to their traditional law and custom, spiritual sanctions are visited upon unauthorised entry and if they are the gatekeepers for the purpose of preventing such harm and avoiding injury to the country, then they have … an exclusive right of possession, use and occupation.[114]

[136] In *Sampi*, French J (as his Honour then was) noted that:

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[111] *Ward HC* [577].
[112] *Alyawarr* [93].
[113] *Ward HC* [88].
[114] *Griffiths* [127].

> The right to possess and occupy as against the whole world carries with it the right to make decisions about access to and use of the land by others. The right to speak for the land and to make decisions about its use and enjoyment by others is also subsumed in that global right of exclusive occupation.[115]

[137] The factual basis material includes detail in support of the claimed exclusive rights and interests. Attachment F states that under the traditional laws and customs of the Millewa-Mallee People, strangers are required to ask permission to access and use the resources of the claim area, and that the claim group have the right to refuse permission.[116] This is demonstrated in the statements from members of the claim group, including the proper process under traditional laws and customs that should be followed:

> People who aren't from our country should ask permission to come onto our country. In the old days, my ancestors had "look out" people called messengers, and the only way a person who was not from our country could pass through it was to know the dialect and ask permission. The visiting group would've sent a messenger, and they would've met the messenger from the country they were visiting and sat down and had a talk about where they were going and what they were doing. It was important to ask permission then, and it still is today, because we have our own stories. If people don't know the stories they don't know where they are allowed to go. If they don't speak to people from the country before they go out on country, they might go places they shouldn't and get bad spirits and get sick or pass away.[117]

[138] This applies to non-Aboriginal persons as well, including to ensure that 'evil spirits' do not become attached to people, such as from removing artefacts from Country.[118] [Claim group member 3] states that people can pass away if they take something that they shouldn't, and recounts an incident where a non-Aboriginal person removed an artefact from the mallee country but returned years later to undergo a smoking ceremony to be freed from a spirit:

> We took her back to where she got the artefact from, and smoked her and the site. ... We were the right people to do that because we are from the country – it had to be traditional owners from the country, or it wouldn't have worked. She's free now.[119]

[139] The importance of respecting the spirits and the dangers of not doing so is further set out in the statements from members of the claim group, for example [claim group member 1] describes the importance of smoking ceremonies to purify someone after they have been in contact with spirits, because 'properly smoking yourself stops the spirits coming with you when you've been in contact with them'.[120]

[140] I also consider that the factual basis material in relation to conducting Welcomes to Country is relevant to my consideration of whether exclusive rights and interests can be prima facie established under s 190B(6). [Claim group member 1] describes being taught that the right to carry out a Welcome to Country is an important cultural demonstration of being the

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[115] *Sampi* [1072].

[116] Form 1, Attachment F [28].

[117] Applicant's Additional Material, Statement of [claim group member 3] dated 4 September 2024 [21].

[118] Ibid [22].

[119] Ibid.

[120] Applicant's Additional Material, Statement of [claim group member 1] dated 2 October 2015 [25].

traditional owner for that part of the Country.[121] In my view, this reflects the material in Attachment F that refers to the right, under the traditional laws and customs of the Millewa-Mallee People, to 'speak for, and make decisions about, land and waters.[122]

[141] In my view, the material set out above is sufficient to demonstrate the exercise by the Millewa-Mallee People of rights to speak for Country and to make decisions about its use and enjoyment by others as set out in *Sampi* and to control access in order to protect places and sacred objects within the claim area, and to avoid spiritual harm as described in *Griffiths*. I am satisfied that the material demonstrates that these rights and interests are derived from the traditional laws and customs of the claim group at sovereignty.

[142] As such, I am satisfied that the factual basis material demonstrates that the claimed exclusive rights and interests can be prima facie established under s 190B(6), and should be entered on the Register in accordance with s 186(1)(g).

Non-exclusive rights and interests

[143] Paragraph 4 of Schedule E sets out that the claimed non-exclusive rights and interests are rights to access, remain on and use the land and waters, take the natural resources and protect places, areas and things of traditional significance. The factual basis material contains information in support of each of these claimed rights and interests, some of which is set out above in my consideration of the condition at s 190B(5). Attachment F also states that the traditional laws and customs under which the rights and interests are possessed is the same as or are 'rooted in and derived from the laws and customs' that existed at sovereignty.[123] I also note that Schedule E also refers to the list of activities at Schedule G as examples of those that exercise the claimed non-exclusive rights and interests.

[144] In relation to the claimed right to 'have access to, remain on and use the land and waters', Attachment F states that members of the claim group have maintained a connection with the claim area, including 'for the purposes of living, hunting, fishing, gathering, camping and visiting'.[124] [Claim group member 1] describes camping on the banks of the river as a child, travelling through Country and being taught about belonging to Country.[125] Similarly, [claim group member 2] describes growing up at Mildura and camping, fishing and hunting in various places within the claim area,[126] as well as traditional methods for cooking kangaroo, 'where you put the whole kangaroo on the coals then open it up, same method as the fish'.[127] The material demonstrates how current members of the claim group have learned about the rights to access and use the claim area from their predecessors,[128] and that the apical ancestors travelled throughout the claim area and the old people camped and lived on

[121] Ibid [31].

[122] Form 1, Attachment F [27(a)].

[123] Form 1, Attachment F [42].

[124] Form 1, Attachment F [40].

[125] Applicant's Additional Material, Statement of [claim group member 1] dated 2 October 2015 [14]–[18].

[126] Ibid, Statement of [claim group member 2] dated 29 August 2024 [10]–[12].

[127] Ibid [16].

[128] See, eg, Applicant's Additional Material, Statement of [claim group member 3] dated 4 September 2024 [7].

Country.[129] I am satisfied that the material demonstrates that the exercise of this claimed right is derived from the traditional laws and customs of the Millewa-Mallee People at sovereignty. I am satisfied that the material sufficiently demonstrates that this claimed right can be prima facies established.

[145] In relation to the claimed right to 'access and take the resources of the land and waters', members of the claim group describe fishing hunting and collecting the natural resources of the claim area. This includes traditional methods for fishing, as set out above at paragraph 109, and collecting witchety grubs.[130] Members of the claim group describe the use of the natural resources of the claim area, including fish and kangaroos,[131] as well as plants such as native asparagus,[132] and black box roots for making boomerangs.[133] I also refer to the material at paragraph 109 above in relation to the use of bush medicine by members of the claim group. Further, Attachment F states that the claim group have made economic use of the natural resources of the claim area, including 'for sustenance, trade, exchange and otherwise to their benefit, in accordance with traditional law and custom'.[134] This is supported by material from members of the claim group, for example [claim group member 1] describes how 'the old people used to trade up items – stone, ochre and other goods up and down the river'.[135] In my view, the material also demonstrates that the exercise of rights to take and use the resources of the area is derived from the traditional laws and customs of the Millewa-Mallee People that existed at sovereignty, and have been passed down through the generations.[136] Having regard to this material, in my view the material is sufficient to establish the claimed right to take and use the resources of the claim area on a prima facie basis.

[146] In relation to the claimed right to 'protect places, areas and things of traditional significance on the land and waters', [claim group member 1] describes locating scar trees close to Mildura and ensuring that these are protected, as well as other important cultural areas such as massacre sites and the middens around the river near Mildura.[137] Similarly, [claim group member 3] describes maintaining scar trees, canoe trees and coolamon trees and burial and ceremony sites after a flood consistent with the way he was taught by the old people.[138] Important sites are also protected through respecting the rules that were passed down from the predecessors of the claim group about what places should be avoided.[139] In addition, Attachment F states that the claim group has responsibilities to look after and care for Country in the claim area under their traditional laws and customs, including important sites,

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[129] Applicant's Additional Material, Statement of [claim group member 3] dated 4 September 2024 [10]–[11].

[130] Applicant's Additional Material, Statement of [claim group member 2] dated 29 August 2024 [14].

[131] Ibid [13]–[15].

[132] Ibid [18].

[133] Applicant's Additional Material, Statement of [claim group member 3] dated 4 September 2024 [30].

[134] Form 1, Attachment F [40].

[135] Applicant's Additional Material, Statement of [claim group member 1] dated 2 October 2015 [20]. See also Statement of [claim group member 3] dated 4 September 2024 [29].

[136] See, eg, Applicant's Additional Material, Statement of [claim group member 2] dated 29 August 2024 [23]; Statement of [claim group member 3] dated 4 September 2024 [12].

[137] Applicant's Additional Material, Statement of [claim group member 1] dated 2 October 2015 [23], [26]–[28], [38].

[138] Ibid, Statement of [claim group member 3] dated 4 September 2024 [14]–[15].

[139] Ibid [23].

spiritual features and burial sites.[140] In my view, the material demonstrates that the exercise of rights and interests in protecting places of importance is derived from the traditional laws and customs of the claim group at sovereignty. As such, I am satisfied that the material is sufficient to establish this claimed right on a prima facie basis.

[147] For the above reasons, in my view each of the claimed non-exclusive rights and interests can be prima facie established within the meaning of s 190B(6), and so should be entered on the register under s 186(1)(g).

[148] Because I have formed the view that one or more of the claimed native title rights and interests can be prima facie established, the condition at s 190B(6) is met.

Section 190B(7): traditional physical connection – condition met

[149] Section 190B(7) requires the Registrar to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters, but for certain things done.

[150] Justice Dowsett observed in *Gudjala 2009* that the traditional physical connection under s 190B(7) 'must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs'.[141] 'Traditional' as that term is used under s 223 of the Act, was considered by the members of the joint judgment in *Yorta Yorta* who noted that:

> the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.[142]

[151] In *Doepel*, Mansfield J stated that the task of the Registrar under s 190B(7), requires 'some measure of substantive (as distinct from procedural) quality control upon the application, if it is to be accepted for registration'.[143]

[152] Having regard to this, I understand that I must be satisfied that the material provides a factual basis from which I can establish that at least one member of the claim group has or had the necessary 'traditional' physical association with the application area.

[153] I refer to my above reasons and conclusions regarding the requirements of ss 190B(5) and (6). I consider that the factual basis material contains many examples of the traditional physical connection that the Millewa-Mallee People continue to maintain with the lands and waters in the claim area. [Claim group member 3] describes camping on the claim area, feeling a sense

[140] Form 1, Attachment F [26], [31].
[141] *Gudjala 2009* [84].
[142] *Yorta Yorta* [86].
[143] *Doepel* [18].

of belonging and places where he can feel the old spirits.[144] I also consider that [claim group member 1]'s descriptions of conducting Welcomes to Country, smoking ceremonies and protection of important cultural sites like scar trees on Country demonstrates a traditional physical connection.[145]

[154] In my view, the factual basis material contains sufficient material to demonstrate that at least one member of the claim group currently has a traditional physical connection with the lands and waters of the claim area. As such, I am satisfied that the amended application meets the requirements of s 190B(7).

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

[155] Section 190B(8) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that the application should not have been made because it does not comply with s 61A.

[156] **Section 61A(1)** provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title. Paragraph 7 of each of the Applicant Affidavits state that none of the area covered by the amended application is also covered by an approved determination of native title. This is confirmed in the Geospatial Assessment and my own searches of the Tribunal's database. Paragraph 5 of Schedule B also confirms that the amended application excludes all the lands and waters subject to three adjoining determinations of native title.

[157] **Section 61A(2)** provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in s 61A(4) apply. Paragraphs 2 and 3 of Schedule B of the amended application confirm that the application excludes any areas where a previous exclusive possession act was done that was attributable to the State or Commonwealth respectively, except where extinguishment may be disregarded under ss 47A or 47B.

[158] **Section 61A(3)** provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s 61A(4) apply. I am satisfied that the terms of Schedules B and E indicate that exclusive rights and interests are not claimed over areas where there has been a previous non-exclusive possession act.

[159] Having regard to the information contained in the Applicant Affidavits, the Geospatial Assessment and Schedules B and E, I am satisfied that there is no failure to comply with s 61A. As such, the application meets the requirements of s 190B(8).

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[144] Applicant's Additional Material, Statement of [claim group member 3] dated 4 September 2024 [18]. See also Statement of [claim group member 2] dated 29 August 2024 [20].

[145] Applicant's Additional Material, Statement of [claim group member 1] dated 2 October 2015 [24]–[28].

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

[160] Section 190B(9) provides that the application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that claimed native title rights and interests include claims to ownership of minerals, petroleum or gas wholly owned by the Crown, exclusive rights to waters in an offshore place or extinguished native title rights and interests (except where such extinguishment can be disregarded under certain provisions of the Act).[146]

[161] Schedule Q refers to Schedule E, which provides at paragraph 8 that the any claim to 'resources' in the amended application does not include minerals, petroleum or gas that is wholly owned by the Crown. As such, I am satisfied that the amended application does not claim native title rights and interests contrary to s 190B(9)(a).

[162] Schedule P confirms that no claim of exclusive possession is made in relation to any offshore place. As such, I am satisfied that the amended application does not claim native title rights and interests contrary to s 190B(9)(b).

[163] I am satisfied that the amended application is not made contrary to s 190B(9)(c) because paragraph 4 of Schedule B confirms that the amended application does not cover any areas where native title rights and interests have otherwise been wholly extinguished.

[164] In the absence of evidence to the contrary, having regard to Schedules B, E and P, I am satisfied that the amended application meets the requirements of s 190B(9).

End of reasons

[146] See ss 47(2), 47A(2), 47B(2) or 47C(8) of the Act.

Attachment A

Information to be included on the Register of Native Title Claims

Application name	First Peoples of the Millewa-Mallee Claim
NNTT No.	VC2015/001
Federal Court of Australia No.	VID630/2015

Section 186(1): Mandatory information

In accordance with ss 186, 190A(1) of the *Native Title Act 1993* (Cth), the following is to be entered on the Register of Native Title Claims for the above application.

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

8 October 2015

Date application entered on Register:

13 May 2016

Applicant:

Casey Arden, Shane Jones Snr, Robert Baxter, LeRoy Badenoch, Mark Grist, Nyawi Black, Timothy Johnson, Nathan Giles, Andrea Giles

Applicant's address for service:

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First Nations Legal & Research Services
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Conditions on Applicant's authority

The Applicant must regularly consult with the native title claim group, including before important decisions are made about the claim.

Area covered by application:

[As per the Schedule]

Persons claiming to hold native title:

[As per the Schedule]

Registered native title rights and interests:

[As per the Schedule]

Michael Raine

Delegate of the Native Title Registrar pursuant to ss 190–190D of the Act under an instrument of delegation dated 5 February 2024 and made pursuant to s 99 of the Act.

17 October 2024