



Registration Decision

Application name	First Nations of the South East #2
Name of applicant	Andrew Birtwistle-Smith, Mark Lovett, Kingsley A'Hang, Jean Pinkie, Darren Perry, Michelle Jacquelin-Furr, Gwenda Owen, Christopher Hartman, Myrtle Bonney, Bruce Hammond, Robyn Campbell, Cheryle Saunders
Federal Court of Australia No.	SAD180/2017
NNTT No.	SC2017/001
Date of Decision	14 February 2025
Date of Reasons	17 February 2025

Claim not accepted for registration

I have decided that the claim in the First Nations of the South East #2 application does not satisfy all of the conditions in ss 190B–190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim must not be accepted for registration.

For the purposes of s 190D(3)(a), my opinion is that the claim satisfies all of the conditions in s 190B. For the purposes of s 190D(3)(b), my opinion is that although the claim does not satisfy all of the conditions in s 190C, it has nevertheless been possible to consider the conditions in s 190B.

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')

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')

McLennan v Queensland [2019] FCA 1969 ('McLennan')

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')

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')

Sumner v State of South Australia (Ngarrindjeri Native Title Claim Part A) [2017] FCA 1514 ('Ngarrindjeri Part A')

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 11 December 2024 on behalf of the First Nations of the South East #2 native title claim group ('Amended Application') pursuant to orders made by Judicial Registrar Parkyn on 4 December 2024.² It covers land and waters of approximately 2429 square kilometres in the south east of South Australia, from Salt Creek to about 18 kms north of Kingston SE and extending inland up to approximately 45 kilometres. The amendments made in the Amended Application primarily relate to the operation of s 47C and the inclusion of a s 47C agreement.
- [2] The claim made by the First Nations of the South East People #2 ('FNSE 2 Claim') was first filed on 7 July 2017 and was not entered on the Register of Native Title Claims ('Register'). It is the second claim made on behalf of the First Nations of the South East People, the first of which (SAD211/2017; SC2017/002 – 'FNSE 1 Claim') covers the southeastern corner of South Australia roughly from the eastern boundary of the FNSE 2 Claim to the Victorian border. The FNSE 1 Claim was entered on the Register on 10 November 2017.
- [3] The whole of the FNSE 2 Claim area overlaps the southern portion of a claim made on behalf of the Ngarrindjeri People (SAD6027/1998; SC1998/004) that was filed on 6 July 1998 ('Ngarrindjeri Claim'). On 14 December 2017 a determination was made over that part of the Ngarrindjeri Claim that was not overlapped by the FNSE 2 Claim.³ As a result, the remaining undetermined portion of the Ngarrindjeri Claim and the FNSE 2 Claim wholly overlap, and on 20 March 2020 White J made orders under s 67 of the Act for those proceedings to be heard together, for the proceeding to be referred to as 'The Ngarrindjeri-FNSE Overlap Proceeding' and for all documents in the proceeding to be filed in proceeding number SAD180/2017.⁴
- [4] The Registrar of the Federal Court ('Court') gave a copy of the Amended Application and accompanying affidavits to the Native Title Registrar (Registrar) on 13 December 2024 pursuant to s 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the Amended Application for registration in accordance with s 190A.⁵

Preliminary considerations

Registration conditions

- [5] 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.

² Orders of Registrar Parkyn in *Ngarrindjeri-FNSE Overlap Proceeding* (Federal Court of Australia, SAD180/2017, 4 December 2024).

³ *Ngarrindjeri Part A*.

⁴ Orders of White J in *Ngarrindjeri-FNSE Overlap Proceeding* (Federal Court of Australia, SAD180/2017, 10 March 2020).

⁵ Section 190A(1).

- [6] Section 190A(1A) provides for an 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.
- [7] 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, but only applies where the previous application has been accepted for registration.⁶ Given that the previous application made on 7 July 2017 was not accepted for registration, s 190A(6A) does not apply to the Amended Application.
- [8] I have decided that the claim in the Amended Application must not be accepted for registration and this document sets out my reasons for that decision.

Procedural fairness

- [9] On 16 December 2024 a Senior Officer of the NNTT wrote to both the applicant and the State of South Australia ('State') to invite any submissions or additional material in relation to the application of the registration test by 17 January 2025.
- [10] On 20 December 2024 the State confirmed that it did not wish to make submissions in relation to the amended application. The applicant did not provide any further information or submissions.
- [11] This concluded the procedural fairness process.

Information considered

- [12] 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'.
- [13] I have had regard to information in the Amended Application. There are no other documents provided by the applicant that I must have regard to under s 190A(3)(a).
- [14] There is no information obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers that I must have regard to under s 190A(3)(b).
- [15] The State has not provided submissions in relation to the application of the registration test that I must have regard to under s 190A(3)(c).
- [16] I may also have regard to such other information as I consider appropriate.⁷ I have considered it appropriate to have regard to the original geospatial assessment and overlap analysis prepared by the NNTT's Geospatial Services in relation to the area covered by the FNSE 2 Claim, dated 25 July 2017 ('Geospatial Assessment'), as well as an overlap analysis produced on 14 February 2025 ('Overlap Analysis'). I have also considered it appropriate to have regard

⁶ Section 190A(6A)(b).

⁷ Section 190A(3).

to the original registration test decision in the FNSE 2 Claim dated 6 October 2017 ('Original Registration Decision').

Section 190C: conditions about procedural and other matters — conditions not met

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

[17] 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.

[18] 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...'.⁸ As such, in my view s 190C(2) requires consideration of whether the 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.⁹

Section 61 – native title applications

[19] **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. Twelve persons are named in the Amended Application as comprising the applicant. Schedule A contains a description of the native title claim group as the descendants of 11 named apical ancestors and persons who identify and are accepted as members of the First Nations of the South East People. Each of the persons comprising the applicant have deposed an affidavit for the purposes of s 62 and these have been annexed to the Amended Application ('Applicant Affidavits'). The Applicant Affidavits indicate that each deponent is a member of the native title claim group and is authorised to make the application by the persons in the native title claim group.¹⁰ From 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).

[20] **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 note that the names of the persons comprising the applicant are described in the Amended Application as being jointly the applicant.

⁸ *Doepel* [35].

⁹ See also s 190D(3)(b).

¹⁰ Form 1 Applicant Affidavits [4].

- [21] **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 the address for service. As such, I am satisfied that the Amended Application contains the information required by s 61(3).
- [22] **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).¹¹ As noted above, Schedule A contains a description of the native title claim group. I am satisfied that the Amended Application contains the information required by s 61(4) because Schedule A includes a description of the native title claim group that is sufficiently clear so that it can be ascertained whether any particular person is a member of the claim group.¹²
- [23] **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 12 December 2024.

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

- [24] **Section 62(1)(a)** requires a claimant application to be accompanied by an affidavit sworn by the applicant containing required statements. The relevant provisions contained in s 62(1)(a) of the Act relating to the requirements of the affidavits that must accompany a claimant application were amended on 25 March 2021 by the *Native Title Legislation Amendment Act 2021* (Cth) (the '2021 Amendment Act'). Section 24(2) and (4) of Schedule 1, Part 1 of the 2021 Amendment Act provides that these amendments apply where the authorisation of the applicant occurs after the commencement of the amendments. Part A of the Amended Application indicates that the applicant was authorised on 1 and 2 July 2017, prior to the commencement of the 2021 Amendment Act. As such I will consider the requirements of s 62(1)(a) as it was at the time of the authorisation meeting in 2017. At that time, s 62(1)(a) required a claimant application to be accompanied by sworn affidavits that state the following:
- (i) that the applicant believes that the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application;
 - (ii) that the applicant believes that none of the area covered by the application is also covered by an approved determination of native title;
 - (iii) that the applicant believes that all of the statements made in the application are true;

¹¹ *Gudjala 2007* [31]–[32].

¹² Section 61(4)(a).

- (iv) that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it; and
- (v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

[25] The Applicant Affidavits are in substantially identical terms, and include statements to the effect that 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 application;
- believes that none of the area covered by the application is also covered by an approved determination of native title;
- believes that all of the statements made in the application are true;
- is a member of the FNSE 2 Claim group and is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it; and
- was authorised at a community meeting in accordance with an agreed and adopted decision-making process of voting by show of hands, noting that there is no traditional decision-making process that must be followed.

[26] I am satisfied that the above statements in the Applicant Affidavits meet the description of each of the statements required by s 62(1)(a) as at July 2017. I am therefore satisfied that the Amended Application is accompanied by the documents required by s 62(1)(a).

[27] **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. Schedule L of the Amended Application has been amended to refer to s 47C and Attachment L includes a copy of the relevant s 47C agreement. As such, the Amended Application meets the requirement at s 62(1)(d).

[28] **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. Attachment B contains a written description of the external boundary of the area covered by the Amended Application and Schedule B sets out the areas within the external boundary that are not claimed. As such I am satisfied that the Amended Application contains the information required by s 62(2)(a).

[29] **Section 62(2)(b)** requires that the application include a map showing the boundaries of the area mentioned in s 62(2)(a). As Attachment C contains a map showing the boundaries of the claim area, I am satisfied that the Amended Application contains the information required by s 62(2)(b).

[30] **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 states that the applicant has not undertaken any searches to determine the existence of any non-native title

rights and interests in the land and waters of the claim area. As no searches have been conducted, I am satisfied that s 62(2)(c) is not applicable to the Amended Application.

- [31] **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 contains a description of the claimed native title rights and interests. I am satisfied that the Amended Application meets the requirements of s 62(2)(d) because Schedule E contains the required information.
- [32] **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. I am satisfied that the Amended Application contains the information required by s 62(2)(e) because Attachment F contains a general description of the relevant factual basis.
- [33] **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 lists the activities currently being undertaken by members of the claim group in the application area. I am satisfied that the Amended Application contains the information required by s 62(2)(f).
- [34] **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 refers to Part B of the Ngarrindjeri Claim. As such, I am satisfied that the Amended Application contains the information required by s 62(2)(g).
- [35] **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 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)(ga).
- [36] **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 includes the details of three relevant notices. As such, I am satisfied that the Amended Application contains the information required by s 62(2)(h).
- [37] **Section 62(2)(i)** requires the application include details of any conditions under s 251BA, however as the authorisation of the applicant occurred prior to the commencement of the 2021 Amendment Act, this requirement does not apply to the Amended Application.¹³

Conclusion on s 190C(2)

- [38] 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.

¹³ *Native Title Legislation Amendment Act 2021* (Cth) ('2021 Amendment Act'), ss 24(2) and (4) of Schedule 1, Part 1.

Section 190C(3): no previous overlapping claim group – condition not met

[39] 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’.

[40] Although s 190C(3) is expressed in the past tense, the Explanatory Memorandum to the *Native Title Amendment Act 1998* (Cth) which inserted this provision indicates that its purpose is served if it is interpreted in the present tense, such that ‘no member of the claim group for the application ... *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test’.¹⁴ Having regard to this, I understand that the purpose of s 190C(3) is to prevent an overlapping claim from being on the Register at the same time as an existing claim where that overlapping claim includes claim group members that are also members of the claim group for the existing claim as at the time the registration test is applied.

[41] I understand that in assessing this requirement I may have regard to information which does not form part of the application and accompanying documents.¹⁵

[42] 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).¹⁶ 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.

[43] Schedule H of the Amended Application refers to Part B of the Ngarrindjeri Claim. The Overlap Analysis and my own searches of the NNTT’s databases confirm that the Ngarrindjeri Claim overlaps the whole of the FNSE 2 Claim. The Ngarrindjeri Claim was filed on 6 July 1998 and was entered on the Register in January 2000 following consideration under s 190A. The Ngarrindjeri Claim was on the Register at the time that the FNSE 2 Claim was filed and has not since been removed. As such, I am satisfied that the Ngarrindjeri Claim is a ‘previous application’ within the meaning of s 190C(3)(a) to (c). I must therefore consider whether any person included in the native title claim group for the FNSE 2 Claim is also a member of the Ngarrindjeri Claim.

[44] Schedule O of the application provides as follows:

The applicant and members of the native title claim group are aware that some of their members are members of Part B of the Ngarrindjeri and Others Native Title Claim (SAD6027/1998) which covers the whole application area.

At least two of the apical ancestors listed in the Ngarrindjeri and Others claim Form 1 are listed as apical ancestors for the First Nations of the South East #2 claim group: [apical ancestor 1] and [apical ancestor 2].

¹⁴ Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 303 [29.25], emphasis added.

¹⁵ *Doepel* [16].

¹⁶ *Strickland FC* [9].

- [45] I have reviewed the Register extract from the Ngarrindjeri Claim, which states that the claim group is made up of the descendants of named apical ancestors. I have compared the list of apical ancestors against the description at Schedule A of the FNSE 2 Claim. As a result of this comparison, I have identified common apical ancestors, including [apical ancestor 1] and [apical ancestor 2] as set out at Schedule O of the Amended Application.
- [46] As the Ngarrindjeri Claim and FNSE 2 Claim have members in common, I am satisfied that the FNSE 2 Claim cannot meet the condition at s 190C(3).

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

- [47] 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,¹⁷ or the requirements in subsection (4AA) are met.¹⁸ Attachment R contains a copy of a certification dated 6 July 2017 by South Australian Native Title Services Ltd ('SANTS') under s 203BE. As such, I must consider whether the requirements of s 190C(4)(a) have been met.
- [48] 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'.¹⁹ As such, I understand that my task is to identify the appropriate representative body and be satisfied that the application is certified under s 203BE.

Does the certifying body have power to certify?

- [49] The Overlap Analysis indicates that SANTS is the relevant representative Aboriginal/Torres Strait Islander body responsible for the land and waters covered by the Amended Application. Paragraphs 1 and 3 of the certification at Attachment R indicate that SANTS is funded to perform the functions of a representative body under s 203FE of the Act and was requested to perform its certification functions in relation to the FNSE 2 Claim under s 203BE(1). The certificate is signed by the acting Chief Executive Officer of SANTS. I understand that a Chief Executive Officer may perform the functions of a representative body under an instrument of delegation or as an agent.²⁰
- [50] Having regard to the above, I am satisfied that SANTS is the relevant representative body for the area covered by the application and that it was within its power to issue the certification.

Have the requirements of s 203BE been met?

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

¹⁷ Section 190C(4)(a).

¹⁸ Section 190C(4)(b).

¹⁹ *Doepel* [78], [80]–[82]; see also *Wakaman* [32].

²⁰ *Quall HC* [48], [63] and [93].

[52] **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 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.²¹ Paragraph 5 of the certification contains a statement that meets the requirement at s 203BE(4)(a).

[53] **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 6 to 9 of the certification, including the following information:

- SANTS has worked with claimants and conducted research in relation to a claim in the south east of South Australia over many years;
- SANTS facilitated an authorisation meeting on 1 and 2 July 2017 for the purpose of authorising the proposed claim;
- notice of the authorisation meeting was published through community advertising, newspapers and letters sent to members of the native title claim group;
- at the authorisation meeting the claim group resolved by majority that there is no traditional decision-making process that must be followed, and agreed and adopted a decision-making process by way of majority vote on show of hands;
- resolutions were made unanimously by the claim group, confirming that the attendees at the meeting were representative of the apical ancestors, authorising that the claim be made, authorising those persons to be the applicant and requesting SANTS to certify the claim.

[54] Having regard to the information contained in the certificate at Attachment R, I am satisfied that the certification meets the requirements of s 203BE(4)(b).

[55] **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). Given that the FNSE 2 Claim overlaps the Ngarrindjeri Claim, I consider that the requirement at s 203BE(4)(c) applies to the certification. The certification at Attachment R does contain any information in relation to this requirement, however I note that s 203BE(3) provides that failure by the representative body to comply with this subsection does not invalidate any certification.

Conclusion on s 190C(4)

[56] For the above reasons, in my view the certification at Attachment R satisfies the requirements of s 203BE(4) 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.

²¹ As the authorisation of the applicant occurred prior to the commencement of the 2021 Amendment Act, the requirement at s 203BE(2)(aa) in relation to conditions under s 251BA does not apply: 2021 Amendment Act, ss 24(2) and (4) of Schedule 1, Part 1.

[57] I note that once satisfied that the requirements of s 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)'.²²

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

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

[58] 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.

[59] Attachment B of the Amended Application describes the application area by way of a metes and bounds description referencing roads, cadastral parcels, geographic coordinates referenced to the Geocentric Datum of Australia 1994 (GDA94), an existing native title determination and application boundaries and the mean low water mark. Schedule B lists general exclusions. Schedule B has been amended to refer to s 47C and the s 47C agreement included at Attachment L.

[60] Attachment C contains a colour map prepared by Geospatial Services, titled 'First Nations of the South East No. 2' dated 5 July 2017. The map is on a topographic background depicting the claim area by a dark blue outline, and includes a scalebar, coordinate grid, inset map and notes relating to the source, currency and datum of data used to prepare the map.

[61] The Geospatial Assessment concludes that the written description and map are consistent and identify the claim area with reasonable certainty. 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. I note that the effect of the amendment to Schedule B is to include those areas subject to the s 47C agreement contained at Attachment L. I am satisfied that the Amended Application meets the requirement at s 190B(2).

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

[62] Section 190B(3) requires the Registrar to be satisfied that either the persons in the native title claim group are named in the application,²³ or that persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.²⁴

²² *Doepel* [80].

²³ Section 190B(3)(a).

²⁴ Section 190B(3)(b).

[63] 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;²⁵
- ‘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’;²⁶
- 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’;²⁷ 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’.²⁸

[64] Schedule A describes the native title claim group as follows:

The Native Title Claimants are those Aboriginal people who:

- (a) Are the biological descendants of the following ancestors:
[11 named apical ancestors]; and
- (b) Are identified and accepted as First Nations of the South East people under traditional law and custom on the basis of descent from a First Nations of the South East person; or
- (c) Are accepted by those listed at (a) as being adopted into the First Nations of the South East community under traditional law and custom.

[65] Identifying members of the claim group by descent from named apical ancestors has been accepted by the Court as satisfying the requirements of s 190B(3)(b).²⁹ 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 the description of the native title claim group.

[66] Subparagraph (b) requires persons to identify and be accepted as members of the claim group under the traditional laws and customs. I note that group acceptance has been previously held by the Court as ‘inherent in the nature of a society’.³⁰ 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

²⁵ *Doepel* [51]; *Gudjala 2007* [30].

²⁶ *Gudjala 2007* [33].

²⁷ *Ibid* [34].

²⁸ *WA v NTR* [67].

²⁹ *Ibid*.

³⁰ *Aplin* [260]; *Yorta Yorta* [108].

Yorta Yorta means that they must identify as people who are bound by the one set of laws and customs or normative system.³¹

[67] This criteria for membership of the claim group involves being identified and accepted under traditional laws and customs. These traditional laws and customs are set out in the Amended Application and in my view it is these laws and customs that provide the relevant rules or principles by which it can be ascertained whether a particular person meets this criteria for membership.

[68] Subparagraph (c) of Schedule A indicates that membership includes by way of adoption into the First Nations of the South East community. I note that in *WA v NTR*, Carr J accepted a description which included ‘persons adopted by the named people and by the biological descendants of the named people’ without any qualification indicating whether the adoption was according to traditional laws and customs or otherwise. In the FNSE 2 Claim, the description of the claim group notes that membership through adoption is under traditional law and custom. In my view, it is the traditional laws and customs that provide the relevant rules or principles for ascertaining whether a person is included in the claim group description through adoption.

[69] Having regard to the above, 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 such, the condition at s 190B(3) is met.

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

[70] 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.³²

[71] In *Doepel*, Mansfield J noted 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.³³ It is also open to the Registrar to read the contents of the claimed rights and interests together with any stated qualifications or restrictions.³⁴ 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)’.³⁵

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

1. Over areas where a claim to exclusive possession can be recognised (such as areas where there has been no prior extinguishment of native title or where s 238 and/or ss 47, 47A and 47B apply), members of the native title claim group claim the right to possess, occupy, use

³¹ *Sampi FC* [45].

³² *Doepel* [16].

³³ *Ibid* [99], [123].

³⁴ *Ibid* [123].

³⁵ *Strickland* [60]. See also *Strickland FC* [85]–[87].

and enjoy the lands and waters of the application area as against the whole world, pursuant to their traditional laws and customs.

2. Over areas where a claim to exclusive possession cannot be recognised, the nature and extent of the native title rights and interests claimed in relation to the application area are the non-exclusive rights to use and enjoy the land and waters in accordance with traditional laws and customs being:
 - (a) The right to access and move [about] the Application Area.
 - (b) The right to live, to camp and, for the purpose of exercising the native title rights and interests, to erect shelters and other structures on the Application Area.
 - (c) The right to hunt and fish on the land and waters of the Application Area without the limitation of what purpose.
 - (d) The right to gather and use the natural resources of the Application Area such as food, medicinal plants, wild tobacco, timber, resin, rock, ochre and feathers.
 - (e) The right to share and exchange the subsistence and other traditional resources of the Application Area.
 - (f) The right to use and take the natural water resources of the Application Area.
 - (g) The right to cook on the Application Area and to light fires for domestic purposes but not for the clearance of vegetation.
 - (h) The right to engage and participate in cultural activities on the Application Area including those relating to births and deaths.
 - (i) The right to conduct ceremonies and hold meetings on the Application Area.
 - (j) The right to teach on the Application Area the physical and spiritual attributes of locations and sites within the Application Area.
 - (k) The right to visit, maintain and protect sites and places of cultural and religious significance to Native Title Holders under their traditional laws and customs on the Application Area.
 - (l) The right to be accompanied on the Application Area by those people who, though not native title holders are:
 - (i) Spouses of native title holders, or
 - (ii) People required by traditional law and custom for the performance of ceremonies or cultural activities on the Application Area; or
 - (iii) People who have rights in relation to the Application Area according to the traditional laws and customs acknowledged by native [title holders]
 - (iv) People required by native title holders to assist in, observe, or record traditional activities on the Application Area.
3. The rights described in paragraphs 2(b), (c), (d), (e), (f) and (i) are traditional rights exercised in order to satisfy personal, domestic, or communal needs.

[73] Paragraph 4 of Schedule E confirms that the claimed rights and interests are subject to the valid laws of the State or Commonwealth and the rights conferred upon persons pursuant to those laws.

[74] I note that there appear to be minor typographical errors in paragraphs 2(a) and 2(l)(iii) of Schedule E. Nevertheless, having read Schedule E as a whole, in my view the claimed rights and interests are understandable and have meaning. I do not consider there to be any inherent contradictions. As such I am satisfied that the Amended Application meets the requirements of s 190B(4).

[75] I note that 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

[76] 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.

[77] 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.³⁶

[78] 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.

[79] The guidance provided in *Gudjala FC* by the Full Court 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

³⁶ *Doepel* [17]; *Gudjala FC* [57], [83].

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.³⁷

[80] Justice Dowsett further clarified the task under s 190B(5) in *Gudjala 2009* 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.³⁸

[81] 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'.³⁹

[82] The factual basis material is contained at Attachments F and M. There is also some relevant material in the list of activities at Schedule G. This material has not been amended and is identical to that considered in the Original Registration Decision which concluded that it was sufficient to meet the requirements of s 190B(5).⁴⁰ I have considered all of the factual basis material myself and am satisfied that the material is sufficient to support the assertions at s 190B(5). I have also referred below to the paragraphs of the Original Registration Decision that summarise the relevant material in relation to each of the assertions at s 190B(5). In addition to setting out some of the relevant material myself below, for expediency I also refer to the further detail of the factual basis material set out in the Original Registration Decision.

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

[83] Section 190B(5)(a) was recently considered by Reeves J in *McLennan*. His Honour set out the relevant principles as follows:

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

- (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

³⁷ *Gudjala FC* [92].

³⁸ *Gudjala 2009* [29]; *Anderson* [43], [47]–[48].

³⁹ *Gudjala 2009* [29].

⁴⁰ First Nations of the South East People #2 SC2017/001 (registration test decision dated 6 October 2017) ('Original Registration Decision'), page 13 [66].

- (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]].⁴¹

[84] 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).⁴²

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

[85] The relevant material is summarised and considered in the Original Registration Decision at paragraphs 76 to 91. I note that the factual basis material includes information that relates both to the claim area of the FNSE 2 claim as well as the broader Country of the First Nations of the South East People that also includes the FNSE 1 Claim. One member of the claim group describes how her ancestors are in this Country and that it is a very spiritual place.⁴³

[86] The material indicates that the First Nations of the South East People comprise three groups, Bunganditj (also spelt as Boandik or Buwandik), Potaruwutj and Meintangk (also spelt as Moandik).⁴⁴ The relevant boundaries are described in early historical sources from 1879 and 1880 and are consistent with the claimed Country of the First Nations of the South East People, for example one Bunganditj-speaker stated in 1879 that his Country encompassed Salt Creek, Galls Station and Padthaway.⁴⁵ Records from 1946 and accounts from current claimants relating to the existence of old camp sites and bones located in the area claimed by the First Nations of the South East People demonstrate the historical occupation of the area by Aboriginal persons.⁴⁶

[87] The factual basis material sets out that the early European settlement in the area occurred in the 1860s, referring to homesteads that were established by John Gall within the FNSE 2 Claim area near Salt Creek at Tilleys Swamp and Cantara.⁴⁷ The material refers to genealogical and documentary research, as well as the oral history of current claimants, demonstrating that the apical ancestors are recorded as persons from and living in the south east area or from the language groups that have been identified as belonging to the area.⁴⁸ Site-related stories are consistently set out in both historical and contemporary accounts, such as stories related to the Granites (within the FNSE 2 Claim area).⁴⁹ The material includes an account from a

⁴¹ *McLennan* [28], citations incorporated from original.

⁴² *Gudjala 2007* [39].

⁴³ Form 1, Attachment M, page 4.

⁴⁴ *Ibid*, Attachment F, page 1.

⁴⁵ *Ibid*, pages 2–3.

⁴⁶ *Ibid*, pages 12–13; Attachment M, page 2.

⁴⁷ *Ibid*, Attachment F, page 3.

⁴⁸ *Ibid*, pages 2–3. Schedule A also records particular associations for most of the named apical ancestors relating to areas in the vicinity of the FNSE 2 Claim and within the FNSE 1 Claim (Kingston SE, Mount Gambier, Bordertown and Millicent).

⁴⁹ Form 1, Attachment F, pages 6–7.

member of the claim group who describes the place where one of the apical ancestors is buried at Salt Creek, within or in the vicinity of the FNSE 2 Claim Area.⁵⁰

- [88] Accounts from members of the claim group describe the association that the predecessors of the claim group had, as well as contemporary associations with particular locations within the FNSE 2 Claim area, such as Sandys Hut, the Granites and Salt Creek, and locations in the vicinity of the claim area such as Blackford (within the FNSE 1 Claim area).⁵¹ Another current member of the claim group describes spending time with family and camping on the Coorong within the FNSE 2 Claim area and at Sandys Hut and the Granites.⁵² In addition, Schedule G refers to members of the claim group currently residing in or in the vicinity of the FNSE 2 Claim area, as well as visiting and using the resources of the area.⁵³
- [89] From the above information and the further detail set out in the Original Registration Decision, I consider that the factual basis material is sufficient to enable a 'genuine assessment' of the assertion that members of the claim group and their predecessors have an association with the claim area.
- [90] Although there is less detail specifically relating to the apical ancestors, I am willing to infer⁵⁴ that the Bunganditj, Potaruwutj and Meintangk people occupied the FNSE 2 Claim area and the broader area asserted in the FNSE 1 Claim at the time of European settlement, and that the named apical ancestors are representative of these people. My view is strengthened by the early accounts from 1879 and 1880 describing the boundaries of these groups. The material also refers to evidence of Aboriginal occupation within the area and includes detail relating to important stories about sites within the claim area. Current claimants refer to the association of their predecessors with particular locations as well as the association of the current members of the claim group. Current members of the claim group also describe living, camping and using the resources of the claim area as well as important sites and stories within the claim area.
- [91] I also note the conclusion in the Original Registration Decision that the same factual basis material was sufficient to support the assertion at s 190B(5)(a).⁵⁵
- [92] In my view, the factual basis material demonstrates connections of both the predecessors and current members of the claim group with the FNSE 2 Claim area with sufficient geographical particularity to support the assertion of an association between the whole group and the claim area since sovereignty.⁵⁶ For the above reasons, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(a).

⁵⁰ Ibid, page 9.

⁵¹ Ibid.

⁵² Ibid, pages 8–9.

⁵³ Form 1, Schedule G.

⁵⁴ As also inferred in the Original Registration Decision at pages 14–16, paragraphs [78], [80] and [83].

⁵⁵ Original Registration Decision, page 13 [91].

⁵⁶ *Gudjala 2007* [52]. See above paragraph 86; Form 1, Attachment F, Comparative Table.

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

[93] 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, and the traditional customs observed’ by the native title holders.

[94] 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,⁵⁷ where the society consists of a body of persons united in and by their acknowledgement and observance of a body of laws and customs;⁵⁸
- the normative system under which those traditional rights and interests are possessed is one which ‘has had a continuous existence and vitality since sovereignty’;⁵⁹
- 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;⁶⁰
- those laws and customs have been acknowledged and observed without substantial interruption since sovereignty.⁶¹

[95] 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;⁶²
- 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;⁶³ 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.⁶⁴

⁵⁷ *Yorta Yorta* [46].

⁵⁸ *Ibid* [49].

⁵⁹ *Ibid* [47].

⁶⁰ *Ibid* [46], [79].

⁶¹ *Ibid* [87].

⁶² *Gudjala 2009* [37], [52].

⁶³ *Ibid* [40].

⁶⁴ *Ibid* [29], [54].

[96] 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.⁶⁵

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

[97] The relevant material is summarised and considered in the Original Registration Decision at paragraphs 95 to 108. The factual basis material describes the three groups comprising the claim group (Bunganditj, Potaruwutj and Meintangk) as 'a broadly defined cultural confederation of people, having discernible similarities of language and social organisation, and occupying a coastal and temperate inland region which cradled the dry parched mallee heartland'.⁶⁶ These people are described as speaking different dialects of a common language.⁶⁷ Attachment F notes the recent research indicating that the First Nations of the South East People have now become amalgamated into an 'overall South East grouping'.⁶⁸

[98] The Original Registration Decision refers to the information set out in Attachment F from sources as early as 1860 relating to the traditional laws and customs observed by the society at the time of European settlement. It is convenient to set out the relevant summary, as follows:

- They camped throughout the area, and in doing so, used resources readily available from the area, including taking water from lagoons, and lighting fires for cooking and for warmth – at pp. 11-12.
- They regularly hunted and fished throughout the area, and took natural resources such as plants and roots for food and medicine – at pp. 10-12.
- They observed rules around totems, including avoidance of killing or eating one's totem – at p. 14.
- They gathered together with other neighbouring groups, for festivals (corroborees) and to trade, and travelled to other regions for this purpose. When participating in ceremony, they would use ochre and a natural substance from oyster shells to decorate their bodies – at pp. 11, 14.
- They told stories of their forefathers and taught their children to 'love their country' – at p. 14.
- They observed particular rituals and practices for marriage and burials – at p. 13.

⁶⁵ *Warrie* [107]; see also *Alyawarr* [78].

⁶⁶ Form 1, Attachment F, page 1.

⁶⁷ *Ibid*, page 2.

⁶⁸ *Ibid*, page 3.

- Dreaming stories known by these persons served to explain the creation of their country (including significant sites and boundaries), their relationship with neighbouring tribes, and the presence of spiritual forces within the landscape – at pp. 6-7.⁶⁹

[99] As noted above, the material refers to genealogical evidence and oral history that demonstrates a link between the apical ancestors and the people comprising the relevant society in the FNSE 2 Claim area.⁷⁰ The material also sets out how the traditional laws and customs have been passed down from generation to generation, for example stories about particular sites and the importance of protecting them were taught by the Elders,⁷¹ and current members of the claim group describe teaching young people about important places.⁷²

[100] The statements from members of the claim group contained in the factual basis material demonstrate the ongoing observance of traditional laws and customs, such as camping on Country and using the resources of the area,⁷³ knowledge of the boundaries of the area⁷⁴ and protecting and being respectful of important sites.⁷⁵ Creation stories are recorded by Tindale and others from informants that are the predecessors of the claim group,⁷⁶ and current members of the claim group also demonstrate knowledge of creation stories.⁷⁷

[101] I am satisfied that the material outlined above and the further detail set out in the Original Registration Decision 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. In my view, the material demonstrates that the Bunganditj, Potaruwutj and Meintang groups formed the relevant society at the time of European settlement in the FNSE 2 Claim area, and that their traditional laws and customs are maintained by the present members of the First Nations of the South East People. The material provides detail on creation stories, stories associated with sites in the claim area, the observance of traditional rights relating to camping and using the resources of the area, totemic systems and other rituals. In my view, this material supports the assertion that the laws and customs of the First Nations of the South East People are traditional and give rise to the claimed native title rights and interests in the claim area.

[102] I also note the conclusion in the Original Registration Decision that the same factual basis material was sufficient to support the assertion at s 190B(5)(b).⁷⁸

⁶⁹ Original Registration Decision, page 18 [98] (references to Form 1, Attachment F).

⁷⁰ Form 1, Attachment F, page 2.

⁷¹ *Ibid*, page 9.

⁷² Form 1, Attachment M, page 2.

⁷³ Form 1, Attachment F, page 9.

⁷⁴ *Ibid*, pages 4, 9.

⁷⁵ *Ibid*, page 9; Attachment M, pages 1–2.

⁷⁶ Form 1, Attachment F, pages 6–7.

⁷⁷ *Ibid*, page 7.

⁷⁸ Original Registration Decision, page 21 [108].

[103] Having regard to the above, I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(b).

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

[104] Section 190B(5)(c) requires the factual basis material to be sufficient to support the assertion that the native title claim group continue 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).⁷⁹

[105] 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'.⁸⁰

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

[106] The relevant material is summarised and considered in the Original Registration Decision at paragraphs 111 to 116. The above material in relation to the assertions at ss 190B(5)(a) and (b) is also relevant to this condition.

[107] The factual basis material provides examples of the continuing use of the claim area by successive generations, for example a current member of the claim group describes that his great-grandfather was at Sandys Hut in the 1890s, and then his uncle, father and cousins.⁸¹ This claim group member also describes being taught to be respectful of a particular site as a child, and then learning the story related to that site when he was older.⁸² Another member of the claim group describes being taught about bush tucker by her Elders.⁸³ A further example is that a member of the claim group describes her father teaching her about when the fish would come in.⁸⁴

[108] In addition, the material refers to early accounts from 1880 of the Booandik teaching their children to love their Country and about rules relating to totems and use of resources.⁸⁵ Current members of the claim group describe teaching the young children today about the use of resources,⁸⁶ as well as about respecting important sites.⁸⁷

[109] In my view, the factual basis material set out above and the further detail set out in the Original Registration Decision contains sufficient detail to enable a genuine assessment of the extent to which the claim group have continued to hold the native title in accordance with

⁷⁹ *Martin* [29].

⁸⁰ *Gudjala 2009* [33].

⁸¹ Form 1, Attachment F, page 9.

⁸² *Ibid.*

⁸³ Form 1, Attachment M, page 2.

⁸⁴ *Ibid.*, page 3.

⁸⁵ Form 1, Attachment F, page 14.

⁸⁶ Form 1, Attachment M, page 2.

⁸⁷ *Ibid.*, page 2.

their traditional laws and customs. In my view, the material demonstrates that the claim group have continued the transmission of traditional laws and customs from generation to generation. The material includes early accounts of this as well as contemporary accounts from members of the claim group. I also refer to the material set out above in my consideration of the conditions at s 190B(5)(a) and (b).

[110] I also note that the relevant factual basis material was considered to be sufficient to support the assertion at s 190B(5)(c) in the Original Registration Decision.⁸⁸

[111] Having regard to the information above, including the material set out above in relation to the conditions at ss 190B(5)(a) and (b), I am satisfied that the factual basis material is sufficient to support the assertion at s 190B(5)(c).

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

[112] 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.⁸⁹

[113] I understand that I may consider material additional to the application for the purpose of my assessment of this condition.⁹⁰ Because a ‘more onerous test [is] to be applied to the individual rights and interests claimed’ than under s 190B(5),⁹¹ 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.⁹²

[114] 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).⁹³ As such, I must consider whether, on a prima facie basis, the claimed native title rights and interests:

- 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.

[115] Justice Kirby observed in *Ward HC* 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’.⁹⁴ The term “in relation to” is here to be given a ‘wide import’.⁹⁵

⁸⁸ Original Registration Decision, page 22 [116].

⁸⁹ 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.

⁹⁰ *Doepel* [16].

⁹¹ *Ibid* [127], [132].

⁹² *Yorta Yorta* [86]; *Gudjala 2007* [86].

⁹³ *Gudjala 2007* [85]–[87].

⁹⁴ *Ward HC* [577].

[116] The claimed native title rights and interests are set out at paragraph 72. These include both exclusive and non-exclusive claimed rights and interests. I consider that each of these claimed rights and interests are ‘in relation to’ land or waters. I note that in the Original Registration Decision, the factual basis material was considered to be sufficient to establish some, but not all of the claimed rights and interests on a prima facie basis.⁹⁶ I have considered the relevant material and set out my own conclusions in relation to this condition below.

Exclusive rights to possession, occupation, use and enjoyment of the lands and waters

[117] Over areas where a claim to exclusive possession can be recognised, paragraph 1 of Schedule E claims the right to possess, occupy, use and enjoy the lands and waters of the claim area as against the whole world and pursuant to the traditional laws and customs of the First Nations of the South East People.

[118] I note the comments of the High Court in *Ward HC*, 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’.⁹⁷

[119] 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.⁹⁸

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

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.⁹⁹

⁹⁵ *Alyawarr* [93].

⁹⁶ The claimed exclusive rights were not found to be prima facie established: Original Registration Decision, page 25 [129].

⁹⁷ *Ward HC* [88].

⁹⁸ *Griffiths* [127].

⁹⁹ *Sampi* [1072].

- [121] As noted at paragraph 126 of the Original Registration Decision, there is some historical material in Attachment F describing the First Nations of the South East People as owning their land, that they ‘jealously guarded’ it, that trespass would result in violent disputes and an Aboriginal guide refused to take stock drovers to a particular site on fear of death.¹⁰⁰ The Original Registration decision also refers to the knowledge of members of the claim group relating to the boundaries of Country.¹⁰¹
- [122] There is also some reference to spiritual harm arising from instances where laws and customs are transgressed. An account from 1880 indicates that ‘sickness and death were the penalties’ for breaking rules relating to not eating one’s own totem animal.¹⁰²
- [123] I have otherwise reviewed all of the material and consider that there is nothing further that may support the claimed exclusive rights. In my view, the above material is insufficient to support this claimed right on a prima facie basis. The material does not demonstrate rights to speak for the land that can be said to demonstrate exclusive rights within the meaning of *Ward HC* and *Sampi* and the material does not demonstrate that the First Nations of the South East People acted as gatekeepers to avoid spiritual harm within the meaning of *Griffiths*.
- [124] For the above reasons, I am not satisfied that the material is sufficient to establish the claimed exclusive rights on a prima facie basis.

Non-exclusive rights and interests

- [125] Schedule E lists 12 claimed non-exclusive rights and interests over areas where a claim for exclusive possession cannot be recognised. I refer to the above factual basis material set out above in my consideration of the condition at s 190B(5), which contains information that is relevant to the claimed non-exclusive rights and interests. I have set out my consideration of each of these claimed rights and interests below. The claimed non-exclusive rights were considered in the Original Registration Decision at paragraphs 130 to 153 and each were found to be prima facie established. I also refer to these passages of the Original Registration Decision for further detail on the material contained in the Amended Application relevant to this condition.
- [126] The material sets out the historical records, as well as accounts from current members of the claim group, which show that the claim group’s predecessors travelled across the claim area and that current members of the claim group continue to access and move about the area, including to live, camp and erect shelters.¹⁰³ The material includes detailed historical information relating to hunting and fishing, for example through traditional hunting techniques to catch fish and birds,¹⁰⁴ and current members of the claim group continue to hunt and fish.¹⁰⁵ The material also refers to gathering and using natural resources such as

¹⁰⁰ Form 1, Attachment F, page 15.

¹⁰¹ Original Registration Decision, page 25 [128].

¹⁰² Form 1, Attachment F, page 14.

¹⁰³ Form 1, Attachment F, pages 9, 11; Attachment M, page 1.

¹⁰⁴ *Ibid*, Attachment F, pages 10–11.

¹⁰⁵ *Ibid*, Attachment M, page 1.

seeds, gum, roots and ochre,¹⁰⁶ and also taking water from springs, lagoons and soaks.¹⁰⁷ The material describes trade routes and the sharing and exchange of bush potatoes, radishes, yams, smoke-dried freshwater fish, ochre and other resources with groups from Victoria.¹⁰⁸ There are examples of the claim group using fires for cooking,¹⁰⁹ as well as evidence of old camp sites with hearths demonstrating historical use of living and cooking on the land.¹¹⁰ The factual basis material includes detail on ceremonies, meetings and rituals conducted on the claim area, including burial and marriage rituals and *maparena* (corroborees).¹¹¹ In relation to teaching on the claim area, I refer to the material above at paragraphs 107 and 108 in relation to the condition at s 190B(5)(c). The material also sets out the importance of protecting and respecting particular sites,¹¹² as well as early historical examples of members of the claim group accompanying other persons onto the claim area.¹¹³

[127] In my view, the above material is sufficient to establish each of the claimed non-exclusive rights and interests on a prima facie basis. As at least some of the claimed rights and interests can be prima facie established, I am satisfied that the Amended Application meets the requirement at s 190B(6).

[128] I note that as I have decided that the FNSE 2 Claim cannot be accepted for registration, although I have found that some of the claimed rights and interests can be prima facie established and so the condition at s 190B(6) is met, the claimed rights cannot be entered on the Register under s 186(1)(g).

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

[129] 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.

[130] 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’.¹¹⁴ ‘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

¹⁰⁶ Ibid, Attachment F, pages 11–12, 14; Attachment M, page 2.

¹⁰⁷ Ibid, Attachment F, pages 9, 11; Attachment M, page 1.

¹⁰⁸ Ibid, Attachment F, page 11.

¹⁰⁹ Ibid, page 9; Attachment M, pages 1–2.

¹¹⁰ Ibid, Attachment F, pages 12–13.

¹¹¹ Ibid, pages 13–14.

¹¹² Ibid, page 9; Attachment M, pages 1–2.

¹¹³ Ibid, Attachment F, page 15.

¹¹⁴ *Gudjala 2009* [84].

understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty.¹¹⁵

[131] 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’.¹¹⁶

[132] 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.

[133] I refer to my reasons and conclusions regarding the requirements of s 190B(5) and s 190B(6). I consider that the factual basis material demonstrates the traditional physical connection that members of the claim group continue to maintain with the lands and waters in the claim area. An example of this is contained in Attachment F and demonstrates that a member of the claim group maintains a traditional physical connection with Sandys Hut, Salt Creek and the Granites, within the FNSE 2 Claim area.¹¹⁷ This includes camping, collecting bush tucker, fishing and lighting fires for cooking.¹¹⁸

[134] I am satisfied that the Amended Application establishes 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 application meets the requirements of s 190B(7).

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

[135] 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.

[136] **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 2 of each of the Applicant Affidavits states that none of the area covered by the application is also covered by an approved determination of native title. This is confirmed in the Overlap Analysis and my own searches of the Tribunal’s database.

[137] **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. Paragraph 1 and in particular subparagraph (i) confirms that the claim area excludes any areas covered by a previous exclusive possession act. Paragraph 5 of Schedule B states that this is subject to the operation of ss 47, 47A, 47B and 47C. Having regard to Schedule B, I am satisfied that the Amended Application is not made contrary to s 61A(2).

¹¹⁵ *Yorta Yorta* [86].

¹¹⁶ *Doepel* [18].

¹¹⁷ Form 1, Attachment F, page 9.

¹¹⁸ *Ibid.*

[138] **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. Paragraphs 3 and 5 of Schedule B provide that exclusive possession is not claimed over any areas subject to a valid previous non-exclusive possession act, subject to the operation of ss 47, 47A, 47B and 47C. Having regard to Schedule B, I am satisfied that the Amended Application is not made contrary to s 61A(3).

[139] Having regard to the information contained in the Amended Application, including Schedule B and the Applicant Affidavits as well as the Overlap Analysis, I am satisfied that there is no failure to comply with s 61A. As such, the Amended Application meets the requirements of s 190B(8).

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

[140] 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).¹¹⁹

[141] Schedule Q confirms that the Amended Application does not claim minerals, petroleum or gas wholly owned by the Crown. Schedule P confirms that the application does not claim exclusive possession of all or part of an offshore place. Paragraph 6 of Schedule B confirms that the Amended Application excludes lands of waters where native title rights and interests have been otherwise extinguished, subject to the operation of ss 47, 47A, 47B and 47C.

[142] Having regard to Schedules B, P and Q, I am satisfied that the Amended Application meets the requirements of s 190B(9).

End of reasons

¹¹⁹ See ss 47(2), 47A(2), 47B(2) or 47C(8) of the Act.

Attachment A

Summary of registration test result

Application name	First Nations of the South East #2
NNTT No.	SC2017/001
Federal Court of Australia No.	SAD180/2017
Date of decision	14 February 2025

Section 190B conditions

Test condition	Sub-condition/requirement	Result
Section 190B(2)		Met
Section 190B(3)		Overall result: Met
	Section 190B(3)(a)	NA
	Section 190B(3)(b)	Met
Section 190B(4)		Met
Section 190B(5)		Met
Section 190B(6)		Met
Section 190B(7)		Met
Section 190B(8)		Met
Section 190B(9)		Met

Section 190C conditions

Test condition	Sub-condition/requirement	Result
Section 190C(2)		Met
Section 190C(3)		Not met
Section 190C(4)		Overall result: Met
	Section 190C(4)(a)	Met
	Section 190C(4)(b)	NA
Section 190C(5)		NA