National Native Title Tribunal

Registration test decision

Application name	Eringa #3
Name of applicant	Hughie Tjami and Keith Minungka
State/territory/region	South Australia
NNTT file no.	SC10/4
Federal Court of Australia file no.	SAD189/2010
Date application made	22 November 2010

Name of delegate Renee Wallace

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cwlth).

For the reasons attached, I do not accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cwlth).

For the purposes of s. 190D(3), my opinion is that the claim does not satisfy all of the conditions in s. 190B.

Date of decision: 10 February 2011

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Renee Wallace

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 2 August 2010 and made pursuant to s. 99 of the Act.

Reasons for decision

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Introduction

This document sets out my reasons, as the delegate for the Native Title Registrar (the Registrar), for the decision to not accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cwlth) which I shall call 'the Act', as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

The Registrar of the Federal Court of Australia (the Court) gave a copy of the Eringa #3 claimant application to the Registrar on 24 November 2010 pursuant to s. 63 of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Given that the claimant application was made on 22 November 2010 and has not been amended, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply.

Therefore, in accordance with subsections 190A(6) and (6B) I may only accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. This is commonly referred to as the registration test.

Registration test

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

Pursuant to ss. 190A(6) and (6B), the claim in the application must not be accepted for registration because it does not satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information, as I consider appropriate.

I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

For the purpose of the registration test, I have had regard to the information contained in the following documents:

- Form 1 application;

- Geospatial assessment and overlap analysis dated 1 December 2010; and
- Overlap analysis dated 4 February 2011.

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice'—see s. 94D of the Act. Further, mediation is private as between the parties and is also generally confidential: see also s. 94K and s. 94L.

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication—*Hazelbane v Doepel* [2008] FCA 290 at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

On 14 December 2010, pursuant to s. 66 of the Act which requires the Registrar give a copy of the application to certain persons, the Tribunal sent copies of the application to the State of South Australia (the State). That correspondence informed the representative for the State that any submission in relation to the registration of this matter should be provided to the Registrar by 25 January 2010. The State has not provided any submissions to the Registrar.

On 27 January 2011, I provided the applicant with a preliminary assessment of the application, which indicated that, in my view, the application was likely to fail to satisfy some of the requirements of the registration test. In a letter dated 27 January 2011, and provided with the preliminary assessment of the application, the applicant was informed of the timeframe for testing of this matter, being on or before 11 February 2011. This timeframe was set in response to notification requirements for the application and in consultation with the applicant. The applicant has not provided any additional information to the Registrar or taken steps to amend the application in response to the preliminary assessment provided.

Procedural and other conditions: s. 190C

Subsection 190C(2)
Information etc. required by ss. 61 and 62

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

I am **not satisfied** that the application contains all details and other information, and is accompanied by any document required by ss. 61 and 62 because the application does not contain/is not accompanied by the affidavit required by s. 62(1)(a). This is explained in the reasons below.

In reaching my decision for the condition in s. 190C(2), I understand that this condition is essentially procedural, requiring me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2)— *Northern Territory of Australia v Doepel* (2003) 133 FCR 112 (*Doepel*) at [16] and also at [35] to [39]. In other words, does the application contain the prescribed details and other information?

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

Turning to each of the particular parts of ss. 61 and 62 which require the application to contain details/other information or to be accompanied by an affidavit or other documents:

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

The application contains all details and other information required by s. 61(1).

Part A of the application names two persons, being Hughie Tjami and Keith Minungka, as the applicant and also contains the statement that '[t]he applicant was authorised to make this application for a determination of native title by resolution at an Eringa meeting held on the twenty ninth day of June 2010 at Coober Pedy'.

Schedule A of the application contains a description of the native title claim group.

In my view, the application sets out the persons authorised to make the application and the native title claim group in the terms required by s. 61(1).

As such, I am satisfied that the application contains all the details and other information required by s. 61(1) for the purpose of s. 190C(2).

Name and address for service: s. 61(3)

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

The application contains all details and other information required by s. 61(3).

Part B of the application contains the name and address for service of the persons who are the applicant.

Native title claim group named/described: s. 61(4)

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The application contains all details and other information required by s. 61(4).

I must ensure that this information is contained in the application, but I do not need to be satisfied of the correctness of that information — *Doepel* at [37]; *Wakaman People #2 v Native Title Registrar and Authorised Delegate* [2006] FCA 1198 at [34]. Thus, I am not required to ascertain whether the description operates 'effectively to describe the claim group', but I do have to consider whether there is the appearance of a description which meets the requirements of the Act—*Gudjala People 2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala [2007]*) at [32].

Schedule A of the application contains a description of the native title claim group.

In my view, the application sets out the native title claim group in the terms required by s. 61(4).

As such, I am satisfied that the application contains all the details and other information required by s. 61(4) for the purpose of s. 190C(2).

Affidavits in prescribed form: s. 62(1)(a)

> The application must be accompanied by an affidavit sworn by the applicant that:
> (i) the applicant believes 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, and
> (ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
> (iii) the applicant believes all of the statements made in the application are true, and

(iv) 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.

The application is not accompanied by the affidavit required by s. 62(1)(a).

In my view, the affidavits contain the statements required by s. 62(1)(a)(i)-(iv), but do not contain the 'details of the process of decision-making complied with in authorising the applicant' as required by s. 62(1)(a)(v).

The affidavits of the two (2) persons jointly comprising the applicant each set out the following in relation to authorisation:

(a) I was authorised by Eringa members to make this application and to deal with matters arising in relation to it at an Eringa Meeting held at Cooper Pedy held on the Twenty Ninth day of June 2010.

Section 62(1)(a)(v) requires the applicant to set 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. This specific requirement was introduced as a result of amendments to the Act in 2007, via the *Native Title Amendment (Technical Amendments) Act* 2007 (*Technical Amendments Act*). The previous provision had required the applicant to state 'the basis on which the applicant is authorised as mentioned in (iv)'.

There is no authority, of which I am aware, that considers the level of detail necessary to satisfy s. 62(1)(a)(v). However, in forming my view on this I consider it is appropriate to examine the context for the amendment to s. 62(1)(a) (v) by the *Technical Amendments Act*. I have looked to the explanatory memorandum for the *Technical Amendments Act*. In particular, I note the following as giving context to the amendment to s. 62(1)(a)(v):

1.223 Some affidavits accompanying applications provide little or no information setting out the basis of authorisation, for example, merely setting out the date the authorisation meeting was held. This limits the utility of requiring the applicant to state the basis on which the applicant is authorised.

1.224 Item 72 would amend subparagraph 62(1)(a)(v) to provide that the applicant must include a statement in the affidavit accompanying the application 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. This should include indicating whether the decision-making process complied with paragraph 251[B](a) or 251[B](b).

A note also appears at s. 62(1)(a)(v), that '[s]ection 251B states what it means for the applicant to be ***authorised*** by all the persons in the native title claim group.' Section 251B(a) refers to a process of decision-making mandated by the traditional laws and customs of the native title claim group. Alternatively, s. 251B(b) refers to a decision-making process agreed to and adopted by the native title claim group. Thus, it is clear, that the affidavits should include details of the process that was utilised under s. 251B to authorise the applicant. No such details are included in the affidavits of the two (2) persons jointly comprising the applicant.

It is my view that the affidavits accompanying the application do not set out 'the details of the process of decision-making complied with in authorising the application to make the application and to deal with matters arising in relation to it'—s. 62(1)(a)(v).

Application contains details required by s. 62(2): s. 62(1)(b)

> The application must contain the details specified in s. 62(2).

The application contains all details and other information required by s. 62(1)(b).

The application contains the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

Information about the boundaries of the area: s. 62(2)(a)

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

The application contains all details and other information required by s. 62(2)(a).

Attachment B of the application contains a written description of the area covered by the application.

Attachment B2 of the application contains a written description of areas within those boundaries that are not covered by the application.

As such, I am satisfied that the application contains all the details and other information required by s. 62(2)(a) for the purpose of s. 190C(2).

Map of external boundaries of the area: s. 62(2)(b)

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

The application contains all details and other information required by s. 62(2)(b).

Attachment C of the application contains a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

As such, I am satisfied that the application contains all the details and other information required by s. 62(2)(b) for the purpose of s. 190C(2).

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

The application contains all details and other information required by s. 62(2)(c).

Schedule D of the application contains the statement that the applicant has not undertaken any searches of this kind.

As such, I am satisfied that the application contains all the details and other information required by s. 62(2)(c) for the purpose of s. 190C(2).

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

> The application must contain a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

The application contains all details and other information required by. 62(2)(d).

Schedule E of the application contains a description of the native title rights and interests claimed (an extract of these rights and interests can be seen in my reasons for s. 190B(4)). This description does not merely consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

As such, I am satisfied that the application contains all the details and other information required by s. 62(2)(d) for the purpose of s. 190C(2).

Description of factual basis: s. 62(2)(e)

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (ii) there exist traditional laws and customs that give rise to the claimed native title, and
> (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application contains all details and other information required by s. 62(2)(e).

Schedule F of the application contains the following description of the factual basis:

1. The claimants are part of extant societies namely the Western Desert and Lower Southern Arrernte.
2. The members of those societies set out in Schedule A held native title over the claim area at the time of sovereignty.
3. There continues to exist a vital system of laws and customs among the claimants.

There is also further information pertaining to the claimant's factual basis contained in Schedule A (description of the native title claim group) and Schedule G (description of the activities undertaken by members of the native title claim group on the application area) of the application.

As to what is required for the purpose of s. 62(2)(e), in *Queensland v Hutchison* (2001) 108 FCR 575; [2001] FCA 416 (*Hutchison*), Kiefel J observed that s. 62(2)(e) and s. 190B(5) do not 'entirely correspond'—at [25]. Where s. 62(2)(e) requires that a 'general description' of the factual basis be provided in the application, s. 190B(5) may call for more as the Registrar is required to be satisfied of the sufficiency of the factual basis claimed to support the assertion—*Hutchison* at [25]. Her Honour , in that instance, found that the factual basis provided in the application 'went no way towards compliance with s. 62(2)(e)' as it was simply a restatement of the three particular assertions—at [18].

In *Doepel*, Mansfield J acknowledged, as did Kiefel J in *Hutchison* at [25], that what meets the requirements for s. 62(2)(e) would not necessarily establish a sufficient factual basis for the purpose of s. 190B(5)—at [129] and [131]. Further, the principle enunciated in *Doepel* that s.

190C(2) does not require the Registrar to undertake any form of merit assessment, must also guide a decision maker when assessing the application's ability to comply with s. 190C(2) when considering the details and information prescribed by s. 62(2)(e)—at [16] and [35] to [37].

Thus, in my view, all that is required at s. 62(2)(e) is that the application contain the details and other information amounting to a 'general description' of the factual basis on which it is asserted that the native title rights and interests claimed exist.

I am of the view that, in this instance, the application does contain the details and other information amounting to a 'general description of the factual basis'. The description contained in Schedule F of the application, while in no way sufficient for the purpose of s. 190B(5), does give some general information pertaining to each particular assertion. When considered with other information in the application, such as that which is included in Schedule A and Schedule G, it is my view that the application contains all details and other information required by s. 62(2)(e).

As such, I am satisfied that the application contains all the details and other information required by s. 62(2)(e) for the purpose of s. 190C(2).

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

The application contains all details and other information required by s. 62(2)(f).

Schedule G of the application contains details of the activities currently being carried out by members of the native title claim group in relation to the application area.

As such, I am satisfied that the application contains all the details and other information required by s. 62(2)(f) for the purpose of s. 190C(2).

Other applications: s. 62(2)(g)

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

The application contains all details and other information required by s. 62(2)(g).

Schedule H of the application contains the statement that 'no other application has been made in relation to the whole or part of the area covered by this application'.

As such, I am satisfied that the application contains all the details and other information required by s. 62(2)(g) for the purpose of s. 190C(2).

Section 24MD(6B)(c) notices: s. 62(2)(ga)

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

The application contains all details and other information required by s. 62(2)(ga).

Schedule HA of the application states that this requirement is 'not applicable'. I understand this to mean that the applicant is not aware of any such notices.

As such, I am satisfied that the application contains all the details and other information required by s. 62(2)(ga) for the purpose of s. 190C(2).

Section 29 notices: s. 62(2)(h)

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

The application contains all details and other information required by s. 62(2)(h).

Schedule I of the application contains the statement that the existence of such notices is not known at this time.

As such, I am satisfied that the application contains all the details and other information required by s. 62(2)(h) for the purpose of s. 190C(2).

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

The application **satisfies** the condition of s. 190C(3).

The requirement that the Registrar be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application, is only triggered if the previous application meets all of the criteria in s. 190C(3)(a), (b) and (c)— see *Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

The geospatial assessment states that no applications as per the Register of Native Title Claims (Register) currently fall within the external boundary of this application. I agree with this assessment. On 4 February 2011, I produced an overlap analysis of the agreement area using the Tribunal's internal mapping database and confirmed the accuracy of this information.

As I am satisfied that there are no previous applications that overlap the current application, I am satisfied that the requirements of this section are met.

Subsection 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied that either:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: The word ***authorise*** is defined in section 251B.

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and

(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied.

The application has not been certified. Therefore, I must consider the application against the requirements of s. 190C(4)(b).

For the reasons set out below, I am **not satisfied** that the requirements set out in s. 190C(4)(b) are met.

General requirements

The requirements of s. 190C(4)(b) and s. 190C(5) were considered in *Northern Territory of Australia v Doepel* [2003] FCA 1384 where the Court (Mansfield J) found:

> ...In the case of subs 4(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purpose of s

> 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given—at [78].

Consideration

In regards to these requirements, it is my view that there is a real want of information before me upon which I can form meaningful conclusions.

Schedule R of the application refers to the affidavits as containing the statement and information required of s. 190C(5). The affidavits by the two (2) persons jointly comprising the applicant contain the following statements pertaining to the authorisation of the applicant:

> (d) I am authorised by all the persons in the native title group to make this application and deal with matters arising in relation to it; and
> (e) I was authorised by Eringa members to make this application and to deal with matters arising in relation to it at an Eringa Meeting held at Coober Pedy held on the Twenty Ninth day of June 2010.

Each of the affidavits contains a statement that 'I am authorised by all the persons in the native title group to make this application and deal with matters arising in relation to it'. Part A of the application also contains a similar statement. The affidavits do not include a statement that the applicant is a member of the native title claim group. However, both the persons who jointly comprise the applicant are included in the description of the native title claim group contained in Schedule A of the application, and I am of the view that Schedule A can be taken to include the requisite statement. Thus, it would appear that the application does include a statement to the effect that the requirements of s. 190C(4)(b) have been met—see s. 190C(5)(a).

As to the statement required by s. 190C(5)(b), the grounds set out in this regard are those contained in the affidavits, as extracted above, and the statement that appears at Part A of the application that '[t]he applicant was authorised to make this application for a determination of native title by resolution at an Eringa meeting held on the twenty ninth day of June 2010 at Coober Pedy'. The affidavits do not appear to set out the grounds upon which the Registrar should consider that the applicant is a member of the native title claim group, nor does the application appear to include such a statement. It may be that the inclusion of the two persons who comprise the applicant in the native title claim group description at Schedule A of the application would suffice as a statement briefly setting out those grounds, however it is unnecessary for me to come to any conclusion given my view that the information before me in no way satisfies me as to the requirement of s. 190C(4)(b).

Schedule R of the application also references the affidavits as setting out briefly the grounds on which the Registrar should consider that the applicant 'is authorised to make the application, and deal with matters arising in relation to it'. I note that those grounds do not include any details of the decision-making process complied with —see s. 190C(4)(b) and s. 251B. Neither the affidavits nor the application provide details of the decision-making process complied with. It may be that this absence of information, in the statement setting out the grounds, is not fatal to the application meeting the requirements of s. 190C(5)(b). My own view is that s. 190C(5)(b) may entail the Registrar undertaking some meaningful assessment of the requirement, for instance that the

purported statement does in fact contain the grounds upon which the Registrar should consider that s. 190C(4)(b) has been met or at the very least that there is some correlation between the statement and the requirements of s. 190C(4)(b) . Again, however, I am of the view that it is unnecessary for me to come to any conclusion on the statement given my view that the information before me could not possibly satisfy me as to the requirement of s. 190C(4)(b).

If I were to conclude that the requirements of s. 190C(5) were not met, in my view it would be unnecessary to consider the requirements of s. 190C(4)(b). Section 190C(5) is a necessary precondition that must be met before the Registrar can be satisfied of the requirement of s. 190C(4)(b)—*Doepel* at [78]. In this instance, however, I am of the view that I need not form a view on whether the application contains the statements required by s. 190C(5).

Given the lack of information that is before me I have simply formed the view that I am not satisfied of the requirements of s. 190C(4)(b).

Merit conditions: s. 190B

Subsection 190B(2)
Identification of area subject to native title

> The Registrar must be satisfied that the information and map contained in the application as required by ss. 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

The application **satisfies** the condition of s. 190B(2).

Area covered by the application

Schedule B of the application refers to Attachment B as containing the written description of the application area. The description at Attachment B describes the application area by metes and bounds referencing the Macumba River, abutting native title application, land parcels and coordinate points. It specifically excludes land and waters that are subject to either a native title determination or a native title determination application. These determinations and applications are listed.

Attachment C of the application contains a map of the application area. It is a monochrome copy of an A3 coloured map. It depicts the external boundary of the application area in a dark bold outline and includes vertical hachuring of the land and waters covered by the application. It also shows abutting native title applications and a determination area with labels. These are shown to clearly fall outside the application area.

The geospatial assessment states that the description and map are consistent and identify the application area with reasonable certainty. I agree that the description and map identify the area with reasonable certainty and that, in my view, they appear to be consistent.

Having regard to the identification of the external boundary in Attachment B and the map showing the external boundary at Attachment C, I am satisfied that the external boundaries of the application area have been described such that the location of it on the earth's surface can be identified with reasonable certainty.

Areas not covered by the application – internal boundaries

Attachment B2 of the application lists general exclusions to the application area. There is also a list of more specific exclusions that are identified in Attachment B, being those areas that are subject to a native title determination or native title determination application, being native title determination SAD6022/98 Yankunyitjatjara Antakirinja and native title determination applications SAD6010/98 Eringa, SAD6002/99 Eringa 2, SAD6016/98 Wangkangurru/Yarluyandi and SAD6025/98 Arabunna Peoples.

Whilst the written description at Attachment B2, contains only general exclusions and not a list of tenures, it is in my view sufficient to offer an objective mechanism to identify which areas fall within the categories described.

The use of such a general formulaic approach was discussed in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686, in relation to the information required by s. 62(2)(a) and its sufficiency for the purpose of s. 190B(2). Nicholson J was of the view that such an approach 'could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances'. His Honour examined the probable state of knowledge of the applicant at the time of filing the application as a factor in determining what may be appropriate in the circumstances—at [32]. In that regard, I have considered other information provided in the application, particularly at Schedule D where the application states that no searches have been undertaken in order to determine the existence of any non-native title rights and interests in relation to the application area.

Given the above, in my view, the written exclusions in Attachment B1 and Attachment B2 adequately reflect the state of knowledge of the applicant at this time.

Decision

In my view, both the written description and the map of the application area are clear and identify the area with reasonable certainty.

Subsection 190B(3)
Identification of the native title claim group

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application, or

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

The application **satisfies** the condition of s. 190B(3).

The native title claim group description

The application does not name all the persons in the native title claim group but Schedule A of the application contains a description, which appears as follows:

> The Native Title Claimants are those Aboriginal people who are:
>
> (a) all those Lower Southern Arrernte persons who have a traditional connection to the Determination Area, being all of those described below who:
>
> (i) identify as Lower Southern Arrernte; and
>
> (ii) are recognised by other Native Title Claimants under the relevant Lower Southern Arrernte traditional laws and customs as having rights and interests in the Determination Area;
>
> - the descendants of Willie Doolan
> - the descendants of Yungili and Yungili's brother and their wives, being the sisters of Maggie and Bugagaguna
> - the descendants of Lalayi
> - the descendants of Jimmy Arrerte
> - the descendants of Lilly Summerfield (Summerville)
> - Marilyn Rose Hull Ah Chee and her descendants

- Ian Hodgson and his descendants
- the descendants of Angeline (including Ruth McKenzie, Tom Cramp and Jenny Stewart)
- the descendants of Mary Cleanskin (Nyukapinya) (including Billy Bailes and June Bailes)
- the descendants of Anatjara and Wiltiwa (the parents of Lilly, the Arrernte mother of Edie King)
- the descendants of Harry Taylor
- the descendants of Lorna Terone; and

(b) all those Yankunytjatjara and Luritja persons who

(i) have a spiritual connection to the Determination Area and the Tjukurpa associated with it because in the case of them:

- the Area is his or her country of birth (also reckoned by the area where his or her mother lived during the pregnancy); or
- he or she has had a long term association with the Area such that he or she has traditional geographical and religious knowledge of that country; or
- he or she has an affiliation to the Area through a parent or grandparent with a connection to the Area as specified in sub-paragraphs (i) or (ii) above, including all of those described below who identify as Yankunytjatjara or Luritja ; and

(ii) are recognised by other Native Title Claimants under the relevant Western Desert traditional laws and customs as having rights and interests in the Determination Area.

- the descendants of Willie Doolan
- the descendants of Lalayi
- the descendants of Angeline (including Ruth McKenzie, Tom Cramp and Jenny Stewart)
- the descendants of Mary Cleanskin (Nyukapinya) (including Billy Bailes and June Bailes)
- the descendants of Anatjara and Wiltiwa (the parents of Lilly, the Arrernte mother of Edie King)
- the descendants of Harry Taylor
- the descendants of Mulatjatjara
- the descendants of Lorna Terone
- the descendants of Emily Churchill
- Hughie Tjami and his descendants
- Keith Minungka and his descendants

The law in relation to the task at s. 190B(3)

It is apparent from the description of the native title claim group contained in Schedule A that the conditions of s. 190B(3)(b) are applicable to this assessment. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. The focus of the task 'is not upon the

correctness of the description of the native title claim group, but upon its adequacy' so that any particular person in the group can be identified by the description. It does not require any analysis of whether the persons described do actually qualify for membership to the group—*Doepel* at [37].

In examining a description of the native title claim group of the kind outlined above, the Registrar must consider whether the application of the stated conditions/rules will allow for a sufficiently clear description of the native title claim group in order to ascertain whether a particular person is in that group. Of this task, Carr J in *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591(*WA v NTR*) stated that:

> It may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently...The Act is clearly remedial in character and should be construed beneficially—at [67].

Consideration of the description contained in Schedule A

The description of the native title claim group in the application, as extracted above, divides the description into two separate parts, each of which contains different criteria.

The first part of the description describes 'those Lower Southern Arrernte persons who have a traditional connection to the Determination area'. I understand the description in this regard, to describe those persons by reference to being descendant from a number of named persons. This part of the description also contains additional criteria, being that those persons described identify as Lower Southern Arrernte and that they are recognised as such by other native title claimants.

This part of the description is perhaps unhelpfully structured, in that it describes those persons traditionally connected to the Determination area firstly by reference to identification and recognition and then proceeds to describe persons by descent from named persons. I do not understand this, however, to suggest that these criteria should be treated separately and distinctly. My understanding is that it is the descendants of named persons who make up 'those Lower Southern Arrernte persons who have a traditional connection to the Determination area' and that those are the persons who identify and are recognised as such.

The second part of the description pertains to 'all those Yankunytjatjara and Luritja persons' who have a spiritual connection (by a number of means) to the Determination Area and are recognised by other native title claimants. The description then proceeds to include descendants of named persons.

Again, I do not understand the structure of the description to suggest that these criteria should be treated separately and distinctly. In this regard, it is my understanding that it is the descendants of the named persons that primarily make up 'all those Yankunytjatjara and Luritja persons' who have a spiritual connection to the Determination Area and are recognised by other native title claimants. In forming that understanding I do not discount the possibility that the description may potentially encompass persons who are not descendant from those listed, but who nonetheless have a spiritual connection by the specified means and who are recognised by other native title claimants.

As 'it is consistent with traditional canons of construction to read the paragraphs as part of one discrete passage, and in such a way as to secure consistency...', I have done so in this instance. Further, I am not required to look for any 'cogent explanation' as to the basis on which members qualify for identification—*Gudjala [2007]* at [33] and [34].

Within both parts of the description there is, in my view, a clear starting or external reference point with which to commence any inquiry about whether a person is a member of the native title claim group. I refer to the reference to the descendants of named persons. Describing a claim group by reference to named ancestors is one method that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b)—see *WA v NTR* at [67].

As to the other criteria of membership, my own view is that I could envisage a number of instances in which criteria such as identification, spiritual connection and group recognition, would not be sufficiently clear at s. 190B(3). However, in this instance, I understand that any such inquiry into those additional criteria would necessarily proceed from the identification of the descendants of the named persons. It is my view that this provides a clear starting point with which to commence an inquiry around those persons who are either Lower Southern Arrernte or Yankunytjatjara and Luritja.

In my view this description is sufficiently clear.

Subsection 190B(4)
Native title rights and interests identifiable

> The Registrar must 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.

The application **satisfies** the condition of s. 190B(4).

In *Doepel*, Mansfield J held that it was a matter for the Registrar or her delegate to exercise 'judgment upon the expression of the native title rights and interests claimed'. Further, his Honour felt that it was open to the decision-maker to find, with reference to s. 223 of the Act, that some of the claimed rights and interests may not be 'understandable' as native title rights and interests—at [99] and [123].

Primarily, the test is one of 'identifiability', that is 'whether the claimed native title rights and interests are understandable and have meaning'—*Doepel* at [99].

Schedule E of the application contains a description of the native title rights and interests claimed 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 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 Determination Area;
b) the right to hunt and fish on the land and waters of the Determination Area;
c) the right to gather and use the natural resources of the Determination Area such as food, medicinal plants, wild tobacco, timer, resin, ochre and feathers;
d) the right to share and exchange the subsistence and other traditional resources of the Determination Area;
e) the right to use and trade the natural resources of the Determination Area;
f) the right to live, to camp and, for the purpose of exercising the native title rights and interests, to erect shelters on the Determination Area;
g) the right to cook on the Determination 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 Determination Area;
i) the right to conduct ceremonies and hold meetings on the Determination Area;
j) the right to teach on the Determination Area the physical and spiritual attributes of locations and sites within the Determination Area;
k) the right to visit, maintain and protect sites and places of cultural and religious significance of Native Title Holders under their traditional laws and customs on the Determination Area; and
l) the right to be accompanied on the Determination 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 Determination Area; or
    iii) people who have rights in relation to the Determination Area according to the traditional laws and customs acknowledged by the native title holders; or
    iv) people required by the native title holders to assist in, observe, or record traditional activities on the Determination Area.

3. The rights described in paragraphs 2(b), (c), (d) and (e) are traditional rights exercised in order to satisfy personal, domestic or communal needs.

4. The native title rights and interests are subject to:

    a) the valid laws of the State of South Australia and the Commonwealth of Australia; and
    b) the rights (past or present) conferred upon persons pursuant to the laws of the Commonwealth and the laws of the State of South Australia.

It is my view that the claimed native title rights and interests are understandable and have meaning. The description contained in the application is sufficient to allow the native title rights and interests to be readily identified.

Subsection 190B(5)
Factual basis for claimed native title

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must 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 interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application **does not satisfy** the condition of s. 190B(5) because the factual basis provided is **is not sufficient** to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

Combined reasons for s. 190B(5)

The nature of the task at s. 190B(5)

The Full Court in *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) held that a 'general description' (as required by s. 62(2)(e)) could certainly be of a sufficient quality to satisfy the Registrar for the purpose of s. 190B(5)—at [90] to [92]. Further, the nature and quality of the information required for s. 62(2)(e) purposes was held to be indicative of what may satisfy the Registrar for the purpose of s. 190B(5), but '[o]f 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'*** [emphasis added] —*Gudjala FC* at [92].

While the nature of the task at s. 190B(5) is such that the applicant is only required to provide a general description of the factual basis and requires me to assume that the facts asserted are true, I must consider whether the asserted facts are capable of supporting the existence of the claimed native title rights and interests—*Doepel* at [17].

In considering this, the decisions of Dowsett J in *Gudjala [2007]* and *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala [2009]*) give specific content to each of the elements of the test at ss. 190B(5)(a) to (c). The Full Court in *Gudjala FC,* did not criticise generally the approach that Dowsett J took in relation to these elements in *Gudjala [2007]*[1], including his assessment of what was required within the factual basis to support each of the assertions at s. 190B(5). His Honour, in my view, took a consonant approach in *Gudjala [2009]*.

Thus, in line with those authorities, it is in my view, fundamental to the test at s. 190B(5) that the applicant describe the basis upon which the claimed native title rights and interests are alleged to exist. More specifically, this was held to be a reference to rights vested in the claim group and further that ' it was necessary that the alleged facts support the claim that the ***identified claim group*** [emphasis added] (and not some other group) held the identified rights and interests (and not some other rights and interests)'—*Gudjala [2007]* at [39].

[1] See *Gudjala FC* [90] to [96].

The claimant's factual basis material

The claimant's factual basis material is primarily set out in Schedule F of the application, consisting of the following information and assertions:

1. The claimants are part of extant societies namely the Western Desert and Lower Southern Arrernte.

2. The members of those societies set out in Schedule A held native title over the claim area at the time of sovereignty.

3. There continues to exist a vital system of laws and customs among the claimants.

Schedule A of the application sets out the description of the native title claim group and Schedule G contains details of activities currently carried out by members of the native title claim group. No further information or material is provided in relation to the claimant's factual basis.

Section 190B(5)(a) - that the native title claim group have, and the predecessors of those persons had, an association with the area

On this aspect of the factual basis, not criticised by the Full Court in *Gudjala FC*, Dowsett J directed that one must look for an association 'between the whole group and the area' but without the necessity for each member to have had an association at all times. There must also be material to support an association between the predecessors of the group and the claim area since sovereignty—*Gudjala [2007]* at [52] and *Gudjala FC* at [90] to [96].

In *Martin v Native Title Registrar* [2001] FCA 16, French J (as his Honour was then) held in regard to the requirement at s. 190B(5)(a), that the delegate was not obliged to accept 'very broad statements' that did not demonstrate an association with the entire application area and which lacked any 'geographical particularity'—at [26].

In my view, there is little information of any specificity within the claimant's factual basis material pertaining to the native title claim group's association, and that of their predecessors, with the application area.

The assertion that the members of the claim group 'held native title over the claim area at the time of sovereignty' is nothing more than a general assertion that could not be regarded as specific to the predecessors of the claim group.

Schedule A provides some information as to the persons who comprise the native title claim group and Schedule G details that the members of the claim group currently carry out certain activities on the claim area, such as hunting, fishing, camping and protecting the natural environment. While that material provides some of the factual basis pertaining to the assertion that the native title claim group have an association with the area, my view is that it is in no way sufficient for the purpose of s. 190B(5)(a).

I am not satisfied that the factual basis is sufficient to support the assertion in s. 190B(5)(a).

Section 190B(5)(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

The claimant's factual basis in support of this assertion includes the assertions that the claimants are part of extant societies, being the Western Desert and the Lower Southern Arrernte, and that there continues to be in existence 'a vital system of laws and customs among the claimants'.

Again, this information lacks specificity and simply comprises assertions of a very general nature. In my view, there is simply a dearth of information upon which any genuine assessment can be undertaken in relation to the claimant's factual basis in support of this assertion.

I am not satisfied that the factual basis is sufficient to support the assertion in s. 190B(5)(b).

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

Given my conclusion above and observations on the inadequate nature of the claimant's factual basis, it must follow, in my view, that the factual basis is not sufficient to support the assertion in s. 190B(5)(c).

Subsection 190B(6)
Prima facie case

> The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.

The application **does not satisfy** the condition of s. 190B(6)..

Given my conclusion, formed above at s. 190B(5)(b), that the factual basis is not sufficient to support the assertion that there exist traditional laws and customs that give rise to the claimed native title, it follows, in my view, that the application cannot satisfy this requirement. I note that this, in my view, is consonant with the approach taken by Dowsett J in *Gudjala [2007]* and *Gudjala [2009]* —at [87] and [82] respectively.

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or
> (ii) a statutory authority of the Crown in any capacity, or
> (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

The application **does not satisfy** the condition of s. 190B(7).

Schedule M of the application indicates that details of the requisite traditional physical connection are provided at Schedule G. Schedule G comprises a list of activities that are stated to be currently carried out by the native title claim group in relation to the application area.

It is unnecessary, in my view, to undertake any real assessment of this information as the absence of a factual basis sufficient to support the assertion that there exist traditional laws and customs acknowledged and observed by the native title claim group that give rise to the claim to native title rights and interests, represents a fatal flaw to satisfying this requirement . In *Gudjala [2007]*, Dowsett J held that the absence of any basis to support the inference that there was a pre-sovereignty society having laws and customs, necessarily meant that the application did not satisfy the requirements of s. 190B(7) —at [89].

Subsection 190B(8)
No failure to comply with s. 61A

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

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:

(i) the act was an act attributable to the Commonwealth, or

(ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

The application **satisfies** the condition of s. 190B(8). I explain this in the reasons that follow by looking at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

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.

In my view the application **does not** offend the provisions of s. 61A(1).

The geospatial assessment indicates that no determinations as per the National Native Title Register fall within the external boundary of this application area. I agree with that assessment.

Reasons for s. 61A(2)

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 subparagraph (4) apply.

In my view the application **does not** offend the provisions of s. 61A(2).

Such areas have been excluded from the application area—see Attachment B2 of the application.

Reasons for s. 61A(3)

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.

In my view, the application **does not** offend the provisions of s. 61A(3).

Schedule E of the application states that exclusive rights and interests are only claimed over areas where such rights and interests can be recognised. This, in my view, would exclude any area where a previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

Subsection 190B(9)
No extinguishment etc. of claimed native title

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

The application **satisfies** the condition of s. 190B(9), because it **meets** all of the three subconditions, as set out in the reasons below.

Reasons for s. 190B(9)(a):

The application satisfies the subcondition of s. 190B(9)(a).

Schedule Q of the application states that the native title claim group is not claiming ownership of minerals, petroleum or gas wholly owned by the crown.

Reasons for s. 190B(9)(b)

The application satisfies the subcondition of s. 190B(9)(b).

Schedule P states that this requirement is 'not applicable'. I understand that to mean that the native title claim group is not claiming exclusive possession of all or part of an offshore place.

Result for s. 190B(9)(c)

The application satisfies the subcondition of s. 190B(9)(c).

The application excludes any areas where the native title rights and interests have been wholly extinguished—see Attachment B2.

[End of reasons]

Attachment A
Summary of registration test result

Application name	**Eringa #3**
NNTT file no.	**SC10/4**
Federal Court of Australia file no.	**SAD189/2010**
Date of registration test decision	**10 February 2011**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Not Met**
	re s. 61(1)		**Met**
	re s. 61(3)		**Met**
	re s. 61(4)		**Met**
	re s. 62(1)(a)		**Not Met**
	re s. 62(1)(b)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(ga)	**Met**

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Met
s. 190C(4)			Overall result: Not Met
	s. 190C(4)(a)		N/A
	s. 190C(4)(b)		Not Met

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	N/A
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Not Met
	re s. 190B(5)(a)	Not Met
	re s. 190B(5)(b)	Not Met
	re s. 190B(5)(c)	Not Met
s. 190B(6)		Not Met
s. 190B(7)(a) or (b)		Not Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met

Test condition	Subcondition/requirement	Result
	re ss. 61A(3) and (4)	**Met**
s. 190B(9)		**Aggregate result:** **Met**
	re s. 190B(9)(a)	**Met**
	re s. 190B(9)(b)	**Met**
	re s. 190B(9)(c)	**Met**