National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION
(WHERE "ABBREVIATED" CONSIDERATION OF THE APPLICATION APPLIES)

DELEGATE:	Graham Miner
Application Name:	Irrwanyere Mt Dare
Names of Applicants:	David Doolan, Valerie Naylon Fuschtei, Christine Lennon and Arthur Ah Chee.
Region:	Witjira National Park, South Australia
NNTT No:	SC05/1
Federal Court No:	SAD 66 of 2005
Date Application Made:	30 March 2005

The delegate has considered the application against each of the conditions contained in s.190B and s.190C of the *Native Title Act* 1993 (Cwlth).

DECISION

The application is **NOT ACCEPTED** for registration pursuant to s190A of the *Native Title Act* 1993 (Cwlth).

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Graham Miner

August 2005
Date of Decision

Delegate of the Registrar pursuant to
sections 190, 190A, 190B, 190C, 190D

Brief History of the Application

Delegation Pursuant to Section 99 of the Native Title Act 1993 (Cth)

On 5 May 2005 Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the *Native Title Act 1993* (Cth).

The delegation has not been revoked as at this date.

Information considered when making the Decision

In considering this application I have considered and reviewed all of the information and documents from the following files, databases and other sources:

- Federal Court Applications (original and amended);
- Registration Test file;
- Legal file;
- Determination of Native Title Representative Bodies: their gazetted boundaries;
- National Native Title Tribunal Geospatial database and assessments;
- Register of Native Title Claims;
- National Native Title Register;
- ILUA database;
- Correspondence to and from South Australian Crown Solicitor;
- Correspondence to and from the applicant's legal representative, Johnston Withers, Solicitors and Barristers.

Information provided for consideration by the Registrar's delegate in the application of the registration test in this application was provided to the State. This is in compliance with the decision in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*.

Note: Information and materials provided in the context of mediation on any native title determination application by the claim group have not been considered in making this decision. This is due to the without prejudice nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislative sections refer to the *Native Title Act* 1993 unless otherwise specified.

NOTE TO APPLICANT:

To be placed on the Register of Native Title Claims, the application must satisfy *all* the conditions in sections 190B and 190C of the *Native Title Act*.

S. 190B sets out the merit conditions of the registration test

S. 190C sets out the procedural conditions of the registration test

In the following abbreviated decision, the Registrar's delegate tests the application against s. 190C(3) which is summarised below.

A. Procedural Conditions

Common claimants in overlapping claims: s. 190C(3)

The Registrar 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) an entry relating to the claim in 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 consideration of the previous application under s. 190A.

Reasons relating to this condition

Two (2) applications as per the Register of Native Title Claims and the Schedule of Applications – Federal Court, fall within the external boundary of this application.

- SG 6010/96 (SC96/003) Eringa – accepted for registration 13 February 1996. It has retained continuous registration having been considered as required by s.190A in October 1999.

- SG6016/ 98 (SC97/003) The Wangkangurru/Yarluyandi – accepted for registration 21 August 1997. It has retained continuous registration having been considered as required by s.190A in October 1999.

The area of the current application is entirely overlapped by the larger Eringa and Wangkangurru/Yarluyandi applications. The native title claim group expressly includes <u>all</u> members of Eringa and Wangkangurru/Yarluyandi claim groups (Attachment A).

The applications include general exclusion clauses to exclude PEPA's and category A past acts and claim the benefit of s.47A and s. 47B if available.

The area involved is the whole of the land and waters now held by the Indigenous Land Corporation in and about Mount Dare homestead (forming part of Witjira National Park, South Australia) pursuant to a lease dated 1 July 1989 between the Minister for Environment and Planning and Driveline Pty Ltd.. There are no areas within the leased land that are not covered by the application.

The central issue is whether any existing native title rights and interests in the area covered by the present application have been affected, and to what extent, by any extinguishing acts prior to the lodging of the Eringa and Wangkangurru/Yarluyandi applications and or at the time of amendment and assessment of those applications under s.190A of the NTA.

If all native title rights and interests were completely extinguished the area is effectively excluded from both previous applications by the general exclusion clauses contained in both applications and s. 47 can have no operation in relation to the Eringa and Wangkangurru/Yarluyandi applications.

If that is the case, there is no overlap by either of these applications with the new Mt Dare application and therefore, by definition, no claimants in common.

If, however, native title rights and interests were not completely extinguished at the time of lodgement of the later application then the area has not been excluded from the Eringa and Wangkangurru/Yarluyandi applications and consequently an overlap exists with both applications and, given the description of the native title claim group in the Mt Dare application (see Attachment A) there would be a contravention of the prohibition in s. 190C(3).

Johnston Withers, the applicant's legal representative, submitted (14 April 2005) as follows:

OUTLINE OF SUBMISSIONS

1. This new native title claim was filed in the Federal Court on 30 March 2005 pursuant to ss61 and 47A of the *Native Title Act* 1993 (NTA).

2. The claim is made on behalf of all members of the Eringa native title claim group SG 6010/98 (whom Johnston Withers represent) and all of the members of the Wangkangurru/Yarluyandi native title claim group SG 6016/98 (whom Camatta Lempens represent). Details of authorisation are set out in Attachment "R" to Form 1. hi addition to those details, it is noted that at the mediation conference between the two claim groups in Cooper Pedy on 21 -23 February 2005, an agreement was entered into between the two groups (and including Irrwanyere Aboriginal Corporation as a party) whereby (amongst other things):

   - they recognised each other's traditional rights and interests in the Overlap Area (between their respective existing claim areas of SG 6010/98 and SG 6002/99 and of SG 6016/98);
   - agreed that Irrwanyere Aboriginal Corporation would take responsibility for managing these rights and interests in the Overlap Area;
   - allowed Irrwanyerc Aboriginal Corporation to lodge a further native title claim in relation to that part of the Overlap Area which comprises the Mt Dare Lease area.

3. As noted in Attachment "R" the following resolution was passed at the AGM of Irrwanyere Aboriginal Corporation on 23 February 2005:

That this meeting on behalf of all of the Eringa and Wangkangurru/Yarluyandi claim group members authorises Irrwanyere Aboriginal Corporation to lodge a new native title claim on their behalf over the Mt Dare Lease area with four (4) named applicants, two to be chosen by each group's representatives present,

4. As noted in 1 above, the claim is made under s47A of the NTA (as well as s6l). This is on the basis that the whole of the claim area (the Mt Dare Homestead Lease area) is presently held under lease by the Indigenous Land Corporation (ILC). Accordingly *"the area is held expressly for the benefit of,... Aboriginal Peoples"* for the purposes of s47A(l)(b)(ii) of the NTA: see *Neowarra v Stale of Western Australia* [2003] FCA 1402 at [709] and following.

   [It is also asserted that one or more members of the Irrwanyere Mt Dare native title claim group occupies the area for the purposes of s47A(i)(c): see *Neowarra* at [681] to [687]]

5. The claim area lies at the north western corner of Witjira National Park, which was proclaimed as a national park in 1985 under the *National Parks and Wildlife Act* 1972. By lease dated 1 July 1989 the Minister for Environment and Planning leased the area to Driveline Pty Ltd for a term of 30 years, together with an option of renewal for a further 10 years. The permitted use under the lease is *"for the operation and maintenance of a tourist facility comprising, and without limiting the generality of the foregoing, accommodation and camping facilitates, food and fuel outlets and licensed premises,.,.*" (clause 4.1),

   Significantly, the lease contains wide provisions allowing for public access (clause 4.20).

6. The Mt Dare Homestead lease was acquired by ILC in May 2000. Relevantly this:

   - post-dates the filing of the SG 6010/98 and SG 6016/98 claims (ie the requirements of s47A(l) were not satisfied when they were filed);
   - pre-dates the enactment of the *Native Title (South Australia) (Validation and Confirmation) Amendment Act* 2000 (date of assent: 14 December 2000).

7. The ILC is expected to assign the lease in the near future. For this reason, the new claim has needed to be filed now in order to secure the native title benefits under s47A. It is understood that in accordance with s63 the Registrar has given the Native Title Registrar a copy of Form 1 and other relevant documents. In accordance with si 90A the Native Title Registrar is obliged to consider the new claim for the purposes of the registration test.

   To avoid misunderstanding:

   - it is not proposed that the SG 6010/98 and SG 6016/98 be amended; and
   - it is conceded on behalf of the Irrwanyerc Mt Dare claim group that the new claim is likely to fail the registration test on the basis that s!90C(3) *("no previous overlapping claim* groups") will not be satisfied.

8. By way of explanation, it is noted as follows:

- the new claim area lies within the external geographical boundaries of both SG 6010/98 and SG 6016/98;
- members of each of the claim groups for those claims are members of the claim group for this new claim.

Accordingly, unless the Mt Dare Lease area was excluded from the SG 6010/98 and SG 6016/98 claim areas, the requirements of s190C(3) cannot be satisfied.

9. Both claims excluded from the claim area "a«y *area over which native title has been extinguished at Common Law or by statute save and except for those areas of land or waters over which prior extinguishment may be disregarded in accordance with the provisions of either s47, s47A or s47B of the [NTA]"*. In particular, areas affected by *"category A past acts"* are excluded, as are *"previous exclusive possession acts"* attributable to the State *""where and to the extent that the Stale has made provision as mentioned in s23E... of the NTA in relation to these acts"*.

   These exclusions were identified in the amended Forms 1 for SG 6010/98 and SG 6016/98 as filed in the Federal Court in 1999, resulting in each successfully passing the registration test in that year.

10. I consider first whether the area of the new claim was excluded from the two existing claims as a *"previous exclusive possession act"*. It is asserted that it was not excluded on this basis for the following reasons:

    - the pastoral leases (which pre-dated the proclamation of the National Park) were "*previous non-exclusive possession acts";*
    - the proclamation of the area as national park and its vesting in the Crown pursuant to s35(2) of the *National Parks and Wildlife Act* 1972 were not *"previous exclusive possession acts":* s23B(9A) NTA;
    - The Mt Dare Homestead Lease is a *"previous exclusive possession act"* (see, for example, clause 39 (11) of Part 5 of Schedule 1 to the NTA), but the State had not made provision as mentioned in s23E by the time of the 1999 amendments to the existing claims. [In any event, when the relevant State legislation was enacted in December 2000, the lease was an *"excepted act"* for the purposes of s36F *Native Title (South Australia) Act 1994* (as amended), as by that time, the lease had been acquired by the ILC.]

11. Whilst it is acknowledged that there has been partial extinguishment of native title rights at common law by reason of the pre-1975 pastoral leases, it is asserted that there has been no other extinguishment at common law. If, and to the extent that, any post-1975 acts would, but for the *Racial Discrimination Act* 1975 (RDA), have given rise to the grant or assertion by the Crown of rights inconsistent with the continued existence of other native title rights, either:
    - the native title rights were preserved by operation of the RDA; or
    - those acts were rendered invalid by the RDA and subsequently validated as *"past acts"* by the NTA and the *Native Title (South Australia) Act* 1994,

12. The proclamation of the land as national park did not of itself give rise to a further inconsistency and accordingly was not a *"past act":* sec *Western Australia v Ward* (2002) 191 ALR 1 at [222]. However, the State would argue that a vesting in the Crown under s35(2) of the *National Parks and Wildlife Act* 1972 is in effect the grant of an estate in fee simple (or of the right to exclusive possession) and that, having regard to these inconsistent rights, all subsisting native title rights would have been extinguished, if the vesting had taken place prior to 31 October 1975. The State would accordingly argue that, as the vesting occurred after that date, such rights were wholly suppressed by virtue of the *non-extinguishment principle* on the basis that the vesting constituted a *category D past act* (rather than a *category A past act* see, for example, s229(2)(b)NTA.

13. It is not accepted on behalf of the claim group that the *"vesting"* had this effect nor that it gave rise to any inconsistent rights additional to those arising by virtue of the proclamation. Alternatively, if an inconsistency would have arisen by reason of the *"'vesting"* but for the RDA, it is submitted that the effect of the RDA was the preservation of the subsisting native title rights. Either way, there was no *"past act"* and accordingly no application of the *non-extinguishment principle.* However, even on the State's position, the effect of the *"vesting"* has not been extinguishment of all subsisting native title rights.

14. It is further submitted that the rights granted to the lessee under the Homestead Lease did not give rise to any greater inconsistency with the then subsisting native title rights and that accordingly there was no invalidity at the date of the grant of the lease resulting in subsequent validation under the NTA and the *Native Title (South Australia) Act* as a *category A past act,* In particular, the Lease did not confer rights of exclusive possession over the claim area.

15. If these submissions are correct, then the new claim area lies within the SG 6010/98 and SG 6016/98 claim areas and the new claim will fail the registration test for the reasons identified. However, there are potential benefits for the claim group arising under s47A NTA whether or not the submissions are correct,

The South Australian Crown Solicitor commented (7 June 2005) on the above submission as follows:

> "The State has received a copy of the Applicants' Court submissions dated 14 April 2005 explaining the background to the claim. I note the Applicants' concession that the Irwanyerre Mt Dare claim is likely to fail the registration test on the basis that s!90C(3) will not be satisfied. In these circumstances, the State does not wish to comment further on the registration testing."

By email dated 10 June 2005 Johnston Withers wrote to the Tribunal as follows:

> "I refer to Monica Khouri's letter of 19 May 2005 with enclosures and to your letter of 2 June 2005. I also refer to the letter to you dated 7 June 2005 from Steven Strelan of the Crown Solicitor's Office.

In particular, I note the second paragraph of Mr Strelan's letter in the following terms:

> " *The State has received a copy of the Applicants' Court submissions dated 14 April 2005 explaining the background to the claim. I note the Applicants' concession that the Irrwanyere Mt Dare claim is likely to fail the registration test on the basis that s190C(3) will not be satisfied. In these circumstances, the State does not wish to comment further on the registration testing.* "

On the basis that s190C(3) will not be satisfied, and the State is not arguing otherwise, we do not propose to make further submissions on behalf of the Applicants.

There should however be no misunderstanding in relation to the above: it is our contention on behalf of the Applicants that, but for their inability to satisfy s190C(3), they would be in a position to pass the registration test and, subject to funding, further submissions to the Tribunal would be made for this purpose."

The Crown Solicitor also wrote to the Tribunal on 15 July as follows:

> "I refer to your letters dated 30 June, 4 and 7 July 2005 enclosing further material supplied for the purposes of the registration test in this matter. The State rarely comments substantively on registration test issues and, given the applicants' view that they did not seek registration, made no substantive comment in my letter to you dated 7 June 2005. I note, however, that the delegate appears to be considering granting registration in any event and therefore make the following comments.
>
> The written submissions from the applicants dated 14 April 2005 (supplied to all parties in open Court) suggest that the grant of the leases over the Mt Dare Homestead area were excepted acts under section 36F(4)(b) of the *Native Title* (*South Australia)Act 1*994. For the sake of clarity, the State notes, that section 36F(4)(b) deals with confirmation of what are already acknowledged previous exclusive possession acts. While the extinguishing effect of the Mt Dare leases may not have been confirmed, if s36F(4)(b) applies, the leases are still previous exclusive possession acts by definition.
>
> The State also reserves its position on the question of whether native title over the area has been extinguished at common law.
>
> In any event, native title over a significant portion of the area is likely to have been extinguished by the pastoral lessees' exercise of the right to build pastoral improvements (De Rose v State *of South Australia (No.2)* [2005] FCAFC 11O). Those areas and any adjacent land the exclusive use of which is necessary for the enjoyment of the improvements will therefore have been excluded from the overlapping claims."

By email dated 27 July 2005 Johnston Withers responded to the Tribunal about the Crown Solicitor's letter above as follows:

> We refer to your letter of 15 July 2005 and, in particular, to the enclosed copy letter from the State of the same date.
>
> You have invited us to respond to the submissions of the State as set out in its letter, and we do so as follows:

(i) The State's letter refers to leases over the Mt Dare Homestead area being excepted acts under section 36F(4)(b) of the *Native Title (SA) Act* 1994. There is only one lease which we have so characterised, being the lease granted by the Crown to Driveline Pty Ltd in 1989. All prior leases in relation to that area were pastoral leases, being previous non-exclusive possession acts. It is acknowledged that the 1989 lease was a previous exclusive possession act "by definition" in the sense that, for the purposes of section 23B (2)(c)(i) of the NTA, it is a "Scheduled interest" under clause 39(11) of Part 5 of Schedule 1. However, the mere inclusion of a lease in the Schedule (or for that matter, its being a "commercial lease" for the purposes of s23B(2)(c)(iii) does not mean that every such lease necessarily has conferred a right of exclusive possession. As per our previous submission, we maintain that the 1989 lease to Driveline Pty Ltd did not confer a right of exclusive possession.

(ii) The authority of the Full Court of the Federal Court in *DeRose v State of South Australia (No. 2)* is acknowledged to the effect that native title has been extinguished in relation to those parts of the claim area on which substantial pastoral improvements (ie those of the kind identified in paragraph 6 of the Full Court's determination) were constructed pursuant to the prior pastoral leases and in relation to adjacent areas the exclusive use of which is necessary for the enjoyment of those improvements. On the basis of that authority, it is accordingly acknowledged that those areas are excluded from the Eringa #1 and Wangkangurru/Yarluyandi native title claims ("the pre-existing overlapping claims").

(iii) It is our view that the Full Court's decision with regard to pastoral improvements substantially strengthens the basis for our submission on behalf of the Irrwanyere Mt Dare Native Title Claim Group that the 1989 lease was not a "past act". For the purposes of any consideration of the application of the "inconsistency of incidents test" in relation to that lease, what might otherwise be viewed as a possible inconsistency relevant to the areas referred to in (ii) must now be ignored.

(iv) We stand by our written submissions dated 14 April 2005 on behalf of the native title claim group to the effect that the 1989 lease was not a "past act" and therefore not a "category A past act", inasmuch as it did not purport to grant a right of exclusive possession to the lessee nor indeed any rights which were inconsistent with any of the claimed native title rights and interests subsisting following the earlier grants of pastoral leases over the claim area.

(v) We ask that the claim group now be given the benefit of the doubt in this matter. We confirm that the benefit of the doubt which is being sought is to the effect that the 1989 lease was not a "category A past act" and accordingly the Mt Dare Homestead lease area was not excluded from (but was within the area subject to) the pre-existing overlapping claims.

On that basis, the new claim must fail the registration test by reason of section 190C(3) of the NTA.

(vi) We note that the State is not arguing otherwise. "

I have carefully considered the above submissions.
Having done so it is my opinion that to come to a definitive view in respect of this matter it would be necessary to identify:

1. the native title rights and interests, if any, that existed in the area at the time of the grant of the original pastoral lease;
2. the terms of the original pastoral lease, and its effect, if any, on those rights and interests (over and above extinguishment of the right to control, use or access);
3. the effect of the vesting of the area as a national park;
4. if native title survived the vesting of the national park whether the grant of Drive-line lease is a past act and, if so which category of act;
5. if category A if native title survived the vesting of the national park it is extinguished;
6. if category B or not a past act at all that its effect on any existing native title will need to be determined via the inconsistency of incidents test by comparing the rights granted under the pastoral lease with those granted under the Drive-line lease;
7. the terms and effect of the assignment of the lease to the ILC.

I am not able to do so and I do not believe it is my role to further investigate such matters.

As a consequence of the vesting of the national park or the execution of the Drive-line lease it is possible that native title had been extinguished over the entire application area when the lease was transferred to the ILC. However this is uncertain.

Due to the number of factual uncertainties and contingencies associated with the area involved is not possible to come to a concluded view as to the exact effect of each of the grants, vestings or assignment of interests that have occurred over the area. Consequently it is also not possible for me to be satisfied that no person included in the native title claim group described in Attachment A of the application being considered was a member of the native title claim group for any previous application.

Therefore, I find that there are common members of the present claim with the overlapping claims and hence the requirements of s. 190(C)(3) are not satisfied.

Result: Requirements not met