

REGISTRATION TEST REASONS FOR DECISION

DELEGATE: Brendon Moore

Application name Antakirinja Matu - Yankunytjatjara

Names of Applicant William Herbert Lennon Snr, Ian Crombie, Keith Smith Snr,
David Brown, Herbert Joseph Lennon, Jean Wood.

Application Lodged 14 November 2005

Region South Australia

Tribunal No. SC95/7

Federal Court No. SAD 6007/98

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

DECISION

The application is **ACCEPTED** for registration pursuant to s.190A of the *Native Title Act 1993* (Cwlth).

Brendon Moore

29 November 2006

Date of Decision

Delegate of the Registrar,
Pursuant to s. 99 of the *Native Title Act 1993* (Cth)
of the powers given under ss. 190,
190A, 190B, 190C, 190D

PRELIMINARY MATTERS

General notes

All references to legislative sections refer to the *Native Title Act 1993* (Cth) ('the Act') unless otherwise specified. All references to the Registrar refer to the Native Title Registrar under the Act, unless otherwise specified. All references to the Tribunal refer to the National Native Title Tribunal under the Act, unless otherwise specified.

Delegation pursuant to s 99 of the Act

On 31 May 2006, Christopher Doepel, the Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under ss 190, 190A, 190B, 190C and 190D of the Act. This delegation has not been revoked as at this date.

History of the application

The application was filed in the Federal Court on 24 August 2006

Sections 190A(3), (4) & (5) - Information considered by the delegate

In making this decision I have had regard to the information and documents listed below:

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

- The National Native Title Tribunal's Administration Files and Registration Test Files for SAD 6007/1998 SC 95/7
- The National Native Title Tribunal Geospatial Database
- The Register of Native Title Claims and Schedule of Native Title Applications
- The National Native Title Register
- Correspondence from the State of South Australia dated 20 October 2006.
- Janet Skewes (Ed.) 1997, *Cooper Pedylanguru Tjukurpa – Stories from Anagu of Cooper Pedy*. 80pp. Published by Umoona Community Council.
- Rhonda Traeger 1977? *No Empty Desert*. Chapter extracted from S.A. Scrapbook – Glimpses of Colourful People and Events. Rigby Ltd.
- Department of Lands (Ed. R. Tynan) April 1998, *Tallaringa Lands; Land Use Allocation Recommendations*
- Adele Pring (Ed.) 1990/95, *Women of the Centre* (at pp 88-98, and 139-156). Pascoe Publishing 1990.

- Adele Pring (Ed.) 1998 Aboriginal Artists in South Australia. Department of Education, Training and Employment. Extracts relating to Millie Taylor, Eileen Wingfield and David (Daku) Brown
- Janet Skewes 31 July 1991, Emily Austin's Story. Coober Pedy Times.

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.

Section 190A(6) - Test for registration

The Registrar must accept the claim for registration if the application satisfies all of the conditions in sections 190B and 190C. Section 190B sets out the merit conditions of the registration test. Section 190C sets out the procedural conditions of the registration test. It seems appropriate that I consider the procedural conditions first, followed by the merit conditions.

Section 190A(7) - Withdrawal etc of the application

The Registrar has not received a notice under s 189 or s 189A of the Act.

PROCEDURAL CONDITIONS

Information etc. required by sections 61 & 62.

Section 190C(2):

The Registrar 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.

Native title claim group.

Section 61(1):

Persons who may make application:

Native title determination application:

(1) 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.

Result

This condition is met.

Reasons relating to this condition

Law

Under this section, I must consider whether the application sets out the native title claim group in the terms required by s 61(1). That is one of the procedural requirements to be satisfied to secure registration. If the description of the native title claim group in the application indicates that not all persons in the native title group have been included, or that it is in fact a sub-group of the native title claim group, then the relevant requirement of s 190C(2) would not be met and I should not accept the claim for registration: *Attorney General of Northern Territory v Doepel* 203 ALR 385 ('*Doepel*') at [36].

My consideration under this section does not involve me going beyond the information contained in the application: see *Doepel* [39]. In particular it does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group: *Doepel* at [37].

Information in the application

The description of the persons in the Antakirinja native title claim group is found in Attachment A of the application, which states:

The Antakirinja Maṭu -Yankunyṭjatjara Native Title Claim Group comprises those people (now living) who hold in common the body of traditional laws and customs governing the area subject of the claim.

1. The following sets of siblings, together with all their descendants, are members of the native title claim group:
 - 1.1. Barney Lennon, Millie Taylor, Tilly Waye, Emily Austin, William Lennon Snr and Dorothy Lennon Cayton;
 - 1.2. Rose Matjangka Kutiny and her sisters (whose names are not known at this time)
 - 1.3. Linda Austin, Molly Brown, Jessie Lennon, Robert Austin, Willy Austin and Jimmy Austin;
 - 1.4. Alex Kalyiri Crombie, Larry Pilungu Crombie, Billy Tinyima Pepper Crombie, Jack Katatjunti Crombie and Maudie Nyingangka Brown;
 - 1.5. George Tongerie, Nyumitinya Judy Edwards, Bradman Russell, Eileen Ungkari Crombie and Billy Russell;
 - 1.6. Hazel Brown, Ricky Brown and Martha Edwards;
 - 1.7. Edna Williams, Johnny Fatt, Eva Fatt, Beverly Fatt and Ronald Fatt
 - 1.8. Kelly Tjutatja Brown, Tommy Brown, Henry Brown, Jessie Brown and Billy Nungki Brown;
 - 1.9. Maude Arkaringa Tongerie, Nora Murray, Phil Arkaringa, Jean Wood and Heather Dare;
 - 1.10. Bidy Lang, Lena Lang, Rita Lang, Lesley Lang, Beverly Lang and Joan Lang;
 - 1.11. Jack Lang, Pompey Lang and Hector Lang;
 - 1.12. Gracie Johns, Johnny Johns, Teddy Johns, Joyce Johns and Pamela Johns;
 - 1.13. Milatjari, Tommy Dodd, Darby Gilbert and William Gilbert;
 - 1.14. David Brown, Bulla Brown, Annabel Lang, Ida Brown, Lucy Brown and Linda Brown;
 - 1.15. Ivy Makinti Stewart and Yuntu Spider;
 - 1.16. Billy Mungi and Mumpi Baker;
 - 1.17. Ngitji Ngitji Mona Kennedy Tur and Tjalin Gloria Carroll Hayes;

2. The following persons, together with all their descendants, are members of the native title claim group:
 - 2.1. Eileen Wingfield
 - 2.2. Eileen Kampakuta Brown
 - 2.3. Lallie Lennon
 - 2.4. Sadie Singer
 - 2.5. Monty O'Toole
 - 2.6. Ginger Brown
 - 2.7. Micky Miller

- 2.8. Ginger Mapulya
- 2.9. Nellie O'Toole
- 2.10. Andy Tjanyari
- 2.11. Ruth McKenzie
- 2.12. Arthur Baker
- 2.13. Warren Tunkin
- 2.14. Nyidaroo Gladys Kite

3. Edward Herbert Roberts and the following persons (some of whom are his descendants) and all his other descendants are members of the native title claim group:

- 3.1. Georgina Stockfish
- 3.2. Pauline Roberts
- 3.3. Edward Leslie (Woody) Roberts
- 3.4. Noel Roberts
- 3.5. Kenny Roberts
- 3.6. Kelli Cullingford
- 3.7. Jackson Hunter
- 3.8. Jason Smedley
- 3.9. Jutjara Roberts
- 3.10. Larelle Kite
- 3.11. Stephanie Kite
- 3.12. Malu Roberts
- 3.13. Renee Kite
- 3.14. Deanne Cullingford
- 3.15. Steven Cullingford
- 3.16. Frances Day
- 3.17. Raymond Day
- 3.18. Vikkie Taylor
- 3.19. Naomi Taylor
- 3.20. Christopher Taylor
- 3.21. Yvonne Koolmatrie
- 3.22. Florence Ann Wilson
- 3.23. Norman James Wilson
- 3.24. Trevor William Wilson
- 3.25. Johnathon Desmond Wilson
- 3.26. James Richard Koolmatrie
- 3.27. Rhonda Margaret Koolmatrie
- 3.28. Isaac Coen Lindsay
- 3.29. Tameka Yvonne Lindsay
- 3.30. Christopher John Koolmatrie
- 3.31. Yvonne Ruby Koolmatrie
- 3.32. Cindy Lee Koolmatrie

- 3.33. Rhiannon Lee Fields
 - 3.34. Narissa Fields
4. Principles of incorporation into the Antakirinja Maṭu - Yankunytjatjara Native Title Claim Group according to traditional laws and customs include:
- 4.1. being of Aboriginal descent; and
 - 4.2. having a connection with the claim area in accordance with the traditional laws and customs of the native title group including, but not limited to:
 - 4.2.1. the principle of descent from their ancestors;
 - 4.2.2. the principle of descent by means of claim group members' association with spiritual ("Dreaming") sites and areas within the claim land;
 - 4.2.3. biological descent;
 - 4.2.4. classificatory descent, and
 - 4.2.5. by means of adoption

Consideration

In paragraphs 1 to 3 the claim group is described by name. At paragraph 4 principles of incorporation are provided. I do not understand those principles as being more than descriptive of the underlying factors which bind the group together; that is, they are clearly not intended to further describe or modify the precise description provided by the list of names.

There is nothing in the description or on the face of the application to indicate that the claimants are a sub-group of a larger claim group.

Applicant's name and address.

Section 61(3):

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

Result

This condition is met.

Reasons relating to this condition

The name and the address for service of the applicant are found at Part B of the application.

Applications authorised by persons.

Section 61(4):

A native title determination application that persons in a native title claim group authorise the applicant to make must name the persons or otherwise describe the

persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Result

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 and 62 of the Act. However, I am of the view that under this section my task is not to assess the quality or substance of the statement required by s 62(1)(a)(v), rather it is to verify that a statement which, on its face, conforms to the requirements of the section has been made.

It is my opinion that the description in the application describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons

This condition is met.

Reasons relating to this condition

The application contains a description of the persons in the native title claim group at Attachment A.

Form etc.

Section 61(5):

An application must:

- a. be in the prescribed form,
- b. be filed in the Federal Court,
- c. contain such information in relation to the matters sought to be determined as is prescribed; and
- d. be accompanied by any prescribed documents and any prescribed fee.

Result

This condition is met.

Reasons relating to this condition

s.61(5)(a)

The application is substantially in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations 1998*.

s.61(5)(b)

The application was filed in the Federal Court as required pursuant to s.61(5)(b).

s.61(5)(c)

The application meets the requirements of s.61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to s.62 below.

s.61(5)(d)

The application is accompanied by affidavits in relation to the requirements of s.62(1)(a) from the applicants.

I am satisfied that the application has complied with s.61(5)(d) in relation to the requirement for affidavits pursuant to s.62(1)(a).

See also my reasons in respect of s.62(1)(a) below.

s.62 (1)(b)

There has been compliance with the requirement to include a map pursuant to s.62(1)(b).

See my reasons for decision under s.62(1)(a) and s.62(2)(b) below.

Information etc. in relation to certain applications.

Section 62:

Section 62 has a number of requirements which are separately considered below.

Affidavits accompanying the application.

Section 62(1)(a):

A claimant application must be accompanied by an affidavit sworn by the applicant containing the statements identified in (i) – (v) of s 62(1)(a).

Result

This condition is met.

Reasons relating to this condition

Law

Section 62(1)(a) provides that the application must be accompanied by an affidavit sworn/affirmed by the applicant in relation to the matters specified in subs (i) through to (v). To satisfy the requirements of s 62(1)(a) the persons comprising the applicant may jointly swear/affirm an affidavit or alternatively each of those persons may swear/affirm an individual affidavit.

Information before me

A single affidavit dated 1 September 2004 is jointly signed by all of the persons named as the applicant and competently witnessed. I am satisfied that the affidavit sufficiently addresses the matters required by s 62(1)(a)(i)-(iv).

In relation to the statement required by s 62(1)(a)(v), each deponent states that the basis on which they are authorised as an applicant is pursuant to a decision by the claim group at Coober Pedy on 31 August 2004.

Consideration

The affidavit satisfies the requirements of the section.

The application is certified by the Aboriginal Legal Rights Movement Inc. which is a recognized Native Title Representative Body pursuant to s 203 AD. Further details are in my reasons at s. 19C(4).

Application contains details set out in s 62(2).

Section 62(1)(b):

A claimant application must contain the details specified in subsection (2).

Result

This condition is met.

Reasons relating to this sub-condition

My reasons for this decision are set out under the heading for s 62(2) below.

Details of traditional physical connection and prevention of access.

Section 62(1)(c):

A claimant application may contain details of traditional physical connection and prevention of access.

Result

Provided

Reasons relating to this sub-condition

Section 62(1)(c) of the Native Title Act says:

A claimant application (see section 253):

(c) **may** contain details of:

(i) if any member of the native title claim group currently has, or previously had, any traditional physical connection with any of

the land or waters covered by the application—that traditional physical connection; or
(ii) if any member of the native title claim group has been prevented from gaining access to any of the land or waters covered by the application—the circumstances in which the access was prevented.

It is not mandatory that an application contain these details and accordingly, I only note that the application contains this information.

Details required by s 62(1)(b).

Section 62(2):

Section 62(1)(b) requires the application to contain the details specified in subsection (2) and my findings and reasons are set out below in relation to each subsection.

Information about the boundaries of the application area.

Section 62(2)(a):

A claimant application must contain:

(a) information, whether by physical description or otherwise, that enables the boundaries of:

(i) the area covered by the application; and

(ii) any areas within those boundaries that are not covered by the application

to be identified.

Result

This condition is met.

Reasons relating to this sub-condition

It is my opinion that there is information and maps contained in the application which may enable the area covered by the application to be identified with reasonable certainty.

A written description that enables the external boundary of the area covered by the application to be identified is found in Schedule B.

Additionally, a written description of the areas within the external boundary of the application area, not covered by the application, is found in Attachment B

Map of the application.

Section 62(2)(b):

A claimant application must contain:

- (b) a map showing the boundaries of the area mentioned in subparagraph (a)(i).

Result

This condition is met.

Reasons relating to this condition

A map showing the outer or external boundaries of the application area is found in Attachment C of the application.

Details and results of searches of non-native title right and interest

Section 62(2)(c):

A claimant application must contain:

- (c) details and results of all searches carried out 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.

Result

This condition is met.

Reasons relating to this condition

Attachments D1 to D 10 of the application contain these details and copies of all searches.

The section requires 'details and results of all searches carried out' and the requirement is not limited by reference to who carries out those searches, except to say that as a matter of construction the delegate understands the section as meaning 'carried out by or on behalf of the applicant'. The section could not be intended to burden the applicants with a requirement to provide details of searches done by others.

Description of the claimed native title rights and interests

Section 62(2)(d):

A claimant application must contain:

- (d) a description of the 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.

Result

This condition is met.

Reasons relating to this condition

A description of the claimed native title rights and interests is found in schedule E. The description does not merely consist of a statement to the effect that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished, at law.

Description of the factual basis for the claimed native title rights and interests.

Section 62(2)(e):

A claimant application must contain:

- (e) a general description of the factual basis on which it was 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.

Result

This condition is met.

Reasons relating to this condition

The application contains a general description of the factual basis for the assertion that the claimed native title rights and interests exist and for the particular assertions in schedule F.

Details of activities carried out in application area .

Section 62(2)(f):

A claimant application must contain:

- (f) if the native title claim group currently carry on any activities in relation to the land or waters, details of those activities.

Result

This condition is met.

Reasons relating to this condition

The application contains these details in schedule G.

Details of other applications.

Section 62(2)(g):

A claimant application must contain:

- (g) 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 the whole or a part of the area covered by the application and that seek a determination of native title or a determination of compensation in relation to native title.

Result

This condition is met.

Reasons relating to this condition

Details are provided in Schedule H where it is noted that SG 6025/98 (Arabunna) is an overlapping claim.

The Schedule goes on:

' To the extent that any land or waters covered by this Application also covers Applications for determination of native title SG 6008/98 (Maralinga Tjarutja), SG 6018/98 (Wirangu #1), SG 6019/98 (Wirangu #2) and SG 6020/98 (now Gawler Ranges), such overlaps are not intended by the Applicants and are probably the result of mapping errors.'

At the time of my consideration an assessment by the Tribunal's Geospatial Unit dated 30 October 2006 notes only the Arabunna claim as a 'true' overlap.

The assessment further notes a 'technical' overlap with SAD6011/98 Barngarla Native Title Claim (SC 96/4) but advises that it is an artefact of spatial data and does not represent a true overlap 'on the ground'.

I accept that assessment.

Details of s 29 notices.

Section 62(2)(h):

A claimant application must contain:

(h) details of any notices under section 29 (or under a corresponding provision of a law of a State or Territory), of which the application is aware, that have been given and that relate to the whole or part of the area.

Result

This condition is met.

Reasons relating to this condition

These details are found in attachment I of the application which states:

1. Notices given since 30.9.98 are as follows:

Normandy Mining Ltd, 103-105 King William St., Kent Town, South Australia. Section 63M Notice pursuant to the Mining Act 1971 (SA) dated 8th January 1999, with respect to Exploration License Nos. 2492, 2483 and 2563.

2. Notices given prior to 30.9.98 are as follows:-

Resolute Limited, 4th Floor, The Griffin Centre, 28 The Esplanade, Perth WA 6000. Section 63M Notice pursuant to the Mining Act 1971 (SA) dated 31.10.97 in relation to Mineral Leases to be granted in relation to Mineral Claims 3018, 3019, 3020 and 3021.

I note that the section only requires details of notices of which the applicant is aware. I have no reason to believe that the applicant is aware of others.

Section 190C(2): Result overall.

The Registrar 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.

Result

This condition is met.

No previous overlapping claim groups.

Section 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 section 190A.

Result

This condition is met.

Reasons relating to this condition

Law

The requirement that the Registrar be satisfied in the terms set out in s 190C(3) — which essentially relates to ensuring there are no common native title claim group members between the application currently being considered for registration ('the current application') and any overlapping 'previous application' — is only triggered if all of the conditions found in ss 190C(3)(a), (b) and (c) are satisfied—see *Western Australia v Strickland* (2000) FCR 33 (*Strickland FC*) at [9].

Where the current application is a combination application, as in this case, it is 'made' for the purposes of paragraph (b) on the date each of the pre-combination applications was made, i.e. the date the pre-combination application was lodged with the Registrar or, after 29 September 1998, filed in the Federal Court—see *Strickland FC* at [41]-[45].

For the purposes of s 190C(3)(c), consideration of the entry in relation to the previous application under s. 190A takes place at the time that the Registrar applies the registration test to the current application i.e. the relevant time is not when the current application was made but when it is being considered under s 190A—see *Strickland FC* at [53]-[56].

Where both the current and previous application are combined applications, the date the current application is 'made' for the purposes of s 190C(3)(b) is the date that the pre-combination application which overlaps with the relevant previous pre-combination application was made— *Strickland FC* at [9].

Schedule H notes that SG 6025/98 (Arabunna) is an overlapping claim, as does the Tribunal's Geospatial assessment. I must the consider whether it is a 'previous application.'

The claim before me was filed on 14 November 1995 and registered on 15 November 1995 under the 'old' Act. It was subsequently subject to the registration test on 9 July 1999, when it was accepted for registration.

Arabunna was also filed on 16 January 1998 and registered on 22 January 1998 under the 'old' Act, and was subsequently accepted for registration on 2 November 1999.

Arabunna is thus not a 'previous' application.

Identity of claimed native title holders.

Section 190C(4) :

The Registrar must be satisfied that either of the following is the case:

- (a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: 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.

Requirements for uncertified applications.

Section 190C(5) :

If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

- (a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and
- (b) briefly set out the grounds on which the Registrar should consider that it has been met.

Result

This condition is met.

Reasons relating to this condition

Authorisation or Certification: the role of the Delegate

The nature of the Registrar's task was set out in *Northern Territory of Australia v Doepel* [2003] FCA 1384 at [78]

'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) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes 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. The nature of the enquiry is discussed by French J in *Strickland v NTR* at 259 - 260, and approved by the Full Court in *WA v Strickland* at 51 - 52. Both *Martin* at [13] - [18], and *Risk v National Native Title Tribunal* [2000] FCA 1589 involved consideration of the condition imposed by s 190C(4)(b).'

Sections 190C(4) and 190C(5) are concerned with the authorisation of the applicant to make the application and to deal with matters arising in relation to it by the rest of the native title claim group. I note the following comments by His Honour Justice Mansfield in *Doepel* at [78] in relation to section 190C(4):

Section 190C(4) indicates clearly the different nature of the conditions imposed upon the Registrar . . . The contrast between the requirements of subs (4)(a) and (4)(b) is dramatic. In the case of subs (4)(a), the Registrar is to be satisfied about the fact of certification by an appropriate representative body. 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.

His Honour noted further that if s 190C(4)(a) is satisfied, the Registrar is not required to undertake the task in s 190C(4)(b): at [79]. Further, at [81], His Honour said, in relation to the Northern Territory's contention that the certification in that case could not have provided information sufficient for the Registrar to be satisfied about the applicant's authorisation, particularly having regard to the description of the native title claim group in the application:

[this] submission imposes upon the Registrar a function beyond that required by s 190C(4)(a). Section 203BE(4) requires the certification to include a statement to the effect that the representative body is of the opinion that the requirements of subs (2)(a) and (b) are met and to briefly set out the reasons for the representative body holding that opinion. The NLC certification meets those requirements. The alternative provided for in s 190C(4)(b), and the nature of the obligations of the representative body under s 203BE, indicate in my view that in the one case the responsibility for addressing the requirements of s 251B (to the extent they must be addressed when considering whether to accept an application for registration) rests in substance with the representative body, and in the other case with the Registrar. Section 203BE(2) provides emphatically that the representative body 'must not' provide its certificate unless it is of the opinion that all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it. In my judgment, section 190C(4)(a) does not leave some residual obligation upon the Registrar, once satisfied of the matters to which s 190C(4)(a) expressly refers, to revisit the certification of the representative body.

Section 190C(4)(a) - has the application been certified?

Under this section, I am only required to be satisfied that one of the two conditions in s.190C(4) is met. This application is certified pursuant to s.203BE of the Act by the Aboriginal Land Rights Movement Inc which is the recognised Native Title Representative Body pursuant to s 203AD for all the area covered by the application. I must therefore consider whether the requirements of s.190C(4)(a) in relation to certification are met.

The relevant provisions of Part 11 of the Act for the purposes of this condition are found in s.203BE which states:

- (1) The certification functions of a representative body are:
 - (a) to certify, in writing, applications for determinations of native title relating to areas of land or waters wholly or partly within the area for which the body is the representative body;

- (2) A representative body must not certify under paragraph(1)(a) an application for a determination of native title unless it is of the opinion that:
 - (a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
 - (b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

- (3) If the land and waters covered by the application are wholly or partly covered by one or more applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:
 - (a) achieve agreement relating to native title over the land or waters, between the person in respect of whom the applications are, or would be made;
 - (b) minimise the number of applications covering the land or waters.However a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

(4) A certification of an application for a determination of native title by a representative body must:

- (a) include a statement to the effect that the representative body is of the opinion that the requirements in paragraphs (2)(a) and (b) have been met; and
- (b) briefly set out the body's reasons for being of that opinion; and
- (c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

A signed and dated certificate has been provided by the Aboriginal Land Rights Movement Inc ("ALRM") dated 10 December 2004.

A search of the Tribunal's Geospatial database reveals that ALRM is the sole representative body for the region covered by the application and it is therefore the appropriate body to issue a certificate.

The certificate complies with ss. (2) in that the body states that ALRM has formed the requisite opinions.

The certificate complies with ss. (4)(a) by including the statement required, that ALRM is of the opinion that the requirements of paragraphs (2)(a) and (b) have been met.

The certificate complies with ss. (4)(b) and sets out very detailed reasons for ALRM being of that opinion together with some history of the mediation at Spear Creek (without, of course, providing details which are confidential) and its results. These are facts and circumstances going to the satisfaction of s 203BE(3), compliance with which is not itself a matter I must consider.

The certificate goes on to detail authorisation meetings at Coober Pedy on 31 August – 1 September 2004 at some length, describing, broadly, who was there, the capacity in which those persons attended, the views of ALRM's anthropological staff as to the extent and composition of the claim group, and the basis for them.

Details are also provided of extensive advertising which was carried out over various forms of media in order to most widely publish notice of the meetings. Very full details are provided about the course of those meetings, the matters which were discussed and the manner and substance of their resolution.

The requirements of s 203BE(4)(a), (b) and (c) are satisfied in the certificate.

I find that the provisions of s.190C(4)(a) are satisfied and as a result I do not need to consider ss 190C(4)(b) or (5).

MERIT CONDITIONS

Identification of area subject to native title.

Section 190B(2):

The Registrar must be satisfied that the information and map contained in the application as required by paragraphs 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.

Result

This condition is met.

Reasons relating to this condition

Law

Section 190B(2) requires that the information in the application describing the areas covered by the application is 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 information required to be contained in the application is that described in ss 62(2)(a) and (b), namely:

- information, whether by physical description or otherwise, that enables the boundaries of:
 - a. the area covered by the application (the external boundary of the application area); and
 - b. any areas within those boundaries that are not covered by the application (internal areas within the external boundary that are not covered by the application)to be identified, and
- a map showing the external boundary of the application area

I note that the applicants make exceptions to the particular exclusions cited in the application by claiming the benefit of ss. 47, 47A and 47B of the Act at Schedule L of the application. The applicants assert such rights over various lands and waters which are detailed in Schedule L.

The Courts have considered what information needs to be provided in satisfaction of this section. In *Daniel for the Ngaluma People & Monadee for the Injibandi People v State of Western*

Australia [1999] FCA 686 Nicholson J held that such 'formula' descriptions could be acceptable (at [32]) but that when it might be appropriate to do so depended on the circumstances of the particular case. He then considered the implications for both parties at [37] to [39], noting that the intent of the Act is to ensure that persons holding interests have such certainty as is available, but that certainty may have to await determination (at [38]). He concluded at [39] that;

'whether a class or formula description satisfies the Act requires consideration by the Court in the light of evidence of consideration given to the relevant issues by the first applicants and how feasible it is that greater certainty in detail can be provided consistently with the other requirements of the Act.'

I do not understand the Court as having said that there are no circumstances in which a formula description may not be used.

Information before me

A written description of the external boundary of the application area is found in Schedule B and a map showing this boundary is found in Attachment C. The written description of the external boundary uses a metes and bounds description referencing other identified land parcels. It describes the boundary as it intersects with certain identified cadastral boundaries such as pastoral leases and reserves.

The map marks the external boundary in a clear contrasting line, with the application area also clearly identified within that line. There is a scale bar, locality map and notes relating to its sources and the date it was produced. Underlying cadastral boundaries are shown.

I have a report from the Tribunal's geospatial & mapping analysts dated 30 October 2006 informing me that the description and map are consistent and identify the external boundary with reasonable certainty. I accept that assessment.

A written description of the internal areas within that external boundary that are not covered by the application is found in Attachment B. It is stated that any areas which are covered by certain acts or grants of tenure where native title has been extinguished either because of the Act or the *Titles Validation Act 1994* (WA) are excluded from the application.

Consideration

I am satisfied that the information contained in the application describes the external boundary of the area covered by the application with reasonable certainty. The use of geographic coordinates, cadastral boundaries and a map that shows the external boundary consistently with the written description of it, enable that boundary to be located on the earth's surface with reasonable certainty. In this regard, I also rely on the expert opinion of the Tribunal's geospatial & mapping analysts that the map and description are consistent and identify the boundary with reasonable certainty.

I am of the view that the stated exclusion by class of areas within the external boundary also amounts to information that enables those areas to be identified with reasonable certainty.

In some cases, research and consideration of tenure data held by the State may be required, but nevertheless it is reasonable to expect that the task can be done on the basis of information provided by the applicant.

To conclude, I am satisfied that the information and the map required by ss 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of the land or waters and the requirements of s 190B(2) are met.

Identification of native title claim group.

Section 190B(3):

The Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Result

This condition is met.

Reasons relating to this condition

Law

In *Doepel Mansfield J* said at [16]:

Section 190B . . . has requirements which do not appear to go beyond consideration of the terms of the application: subs 190B(2), (3) and (4).

At [37], Mansfield J also noted in relation to s 190B(3) that:

Its focus is not upon the correctness of the description of the native title claim group, but upon its adequacy so that the membership of the identified native title claim group can be ascertained. It . . . does not require any examination of whether all the named or described persons do in fact qualify as members of the native title claim group.

And at [51]

The focus of s 190B(3)(b) is whether the application enables the reliable identification of persons in the native title claim group. Section 190B(3) has two alternatives. Either the persons in the native title claim group are named in the application: subs 3(a). Or they are described sufficiently clearly so it can be ascertained whether any particular person is in that group: subs (3)(b). Although subs (3)(b) does not expressly refer to the application itself, as a matter of construction, particularly having regard to subs (3)(a), it is intended to do so.

The fact that some factual inquiry may be required to ascertain whether or not a person is in a claim group does not mean that the group has not been sufficiently described: *Western Australia*

v Native Title Registrar (1999) 95 FCR 93 at [67]. However, this does not necessarily mean that any formula will be sufficient to meet the requirements of s 190B(3)(b). It is for the Registrar or his delegate to determine whether or not the description is sufficiently clear: *Ward v Native Title Registrar* [1999] FCA 1732. In my view, s 190B(3)(b) requires that the description contain an objective method of determining who is in the claim group.

Information before me

Attachment A to the Application is a description by name of the persons, now living, and their descendants, who comprise the claim group.

Consideration

The application does not name all the persons in the native title claim group and can not therefore comply with s 190B(3)(a). I must consider if the requirements of s.190B(3)(b) are met, namely 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.

In my view, the description provides an objective means of ascertaining where a person is a member of that group. There are three 'groups' of members, each slightly differently described. The first group is described as "the following group of siblings, together with all their descendants". There are seventeen sets of siblings named. The second group is described as "the following persons, together with all their descendants", followed by 14 named persons. The final group is described as "Edward Herbert Roberts and the following persons (some of whom are his descendants) and all his other descendants", which is then followed by a list of 34 named persons.

There is also provided at clause 4 of Attachment A a description of the 'principles of incorporation' into the Antakarinj Matu – Yankuytjatjara native title claim group. Because the members are effectively named I do not think this clause is intended to modify the description of the group but rather to simply state the principles by which it was assembled.

Some limited factual investigation may be necessary to ascertain whether a person is a descendant of one or more of the named persons but this is not an impediment to the description meeting the requirements of the section (see *Western Australia v Native Title Registrar* (1999) 95 FCR 93 at [67]).

Identification of claimed native title.

Section 190B(4):

The Registrar must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the native title rights and interests claimed to the readily identified.

Result

This condition is met.

Reasons relating to this condition

Law

I am of the view that for a description to be sufficient to allow the claimed native title rights and interests to be readily identified under this section, it must be a native title right and describe what is claimed in a clear and easily understood manner

The use of the phrases 'native title' and 'native title rights and interests' in s.190B(4) is intended to screen from registered status those rights and interests that do not fall within the definition of that term found in s 223 of the Act. On this basis it may be argued that rights and interests that have been found by the Courts to fall outside the scope of s 223 can not be 'readily identified' for the purposes of s 190B(4).

In *Northern Territory of Australia v Doepel* [2003] FCA 1384 Mansfield J suggests a dual test:

In my judgment, the Registrar is not shown to have erred in any reviewable way in addressing the condition imposed by s 190B(4). ... He reached the required satisfaction that ... the claimed native title rights and interests did meet the requirements of being understandable as native title rights and interests and of having meaning. (At [123])

Examples of rights which are not readily identifiable include the right to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,¹ rights to minerals and petroleum under relevant Queensland legislation,² an exclusive right to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters.³

To meet the requirements of s. 190B(4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be registered.

Information before me

Schedule E of the application contains the description of the claimed native title rights and interests and is reproduced in full below at my consideration of s 190B(5). It is a claim to rights of non exclusive possession only. The claim is set out as follows:

1. The nature and extent of the native title rights and interests in relation to the determination area are the rights to use and enjoy the land and waters of the determination area in accordance with the traditional laws and customs being:

There is then set out from (a) to (l) the claimed incidents of those rights.

¹ *Western Australia v Ward* (2002) 191 ALR 1, para [59].

² *Western Australia v Ward*, para [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.

³ *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

Consideration

The rights claimed are all readily identifiable as native title rights.

Factual basis for claimed native title.

Section 190B(5):

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

Result

This condition is met.

Reasons relating to this condition

Law

In *Northern Territory of Australia v Doepel* [2003] FCA 1384 Mansfield J held:

17 Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the 'factual basis on which it is asserted' that the claimed native title rights and interests exist 'is sufficient to support the assertion'. That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts.

Under this section I must be satisfied that a sufficient factual basis is provided to support the assertion that the claimed native title rights and interests exist. The factual basis must support the particular assertions set out in subs (a), (b) and (c) of s 190B(5). These sub-sections set out the important aspects of the overall requirement that there is a sufficient factual basis for the assertion that the claimed native title rights and interests exist, referring as they do to the current and previous members of the native title claim group having an association with the area, the existence of traditional laws and customs acknowledged and observed by the native

title claim group and that group continuing to hold the native title in accordance with those traditional laws and customs.

I am not limited to consideration of information contained in the application but may have regard to information provided by the applicant. (*Western Australia v Strickland* (2000) 99 FCR 33 at [88]- [89] (*'Strickland FC'*)). I may also have regard to information from other sources relevant to my consideration, subject to providing procedural fairness to the applicant, where it is potentially adverse and the applicant has not seen that material (refer concluding words of s 190A(3) that the Registrar 'may have regard to such other information as he or she considers appropriate').

However, the provision of material demonstrating a sufficient factual basis for the claimed rights and interests is ultimately the responsibility of the applicant and there is no requirement that I undertake a search for this material (French J in *Martin v Native Title Registrar* [2001] FCA 16 at [23]).

Information before me

Description of the claimed native title rights and interests in the application

I have before me an application where the applicant claims native title rights and interests of exclusive possession.

Information in the application describing the factual basis

The application provides a relatively brief but satisfactory description of the factual basis in Schedules F and G and that information is supplemented by considerable primary and secondary source material.

Primary affidavit material

[Name Deleted]

[Name Deleted]

[Name Deleted]

[Name Deleted]

Secondary material and its relevance

Janet Skewes (Ed.) 1997, *Cooper Pedylanguru Tjukurpa – Stories from Anagu of Cooper Pedy*. 80pp. Published by Umoona Community Council. These stories were published in the Cooper Pedy Times and tend to concentrate on the lives of the storytellers on the white owned stations where many spent their working lives, so to that extent are of little relevance. However, there are a number of references to the maintenance of traditional ways, laws and customs, particularly at pp19, 20, 23, 27, 29-30, 41, 43, 49, 51, 53, 55, 57-8, 62-3 and 65 and on which I have also relied.

Rhonda Traeger 197? No Empty Desert. Chapter extracted from S.A. Scrapbook – Glimpses of Colourful People and Events. Rigby Ltd. This information is an account by a missionary and Welfare officer. It has a section on laws and customs surrounding death at p157 but is otherwise of little relevance. I have taken it into account.

Department of Lands (Ed. R. Tynan) April 1998, Tallaringa Lands; Land Use Allocation Recommendations. This document provides some analysis of the significance of the site and its prehistory, as well as its cultural significance to the present. It is a site of high archaeological and mythological importance. I have taken it into account.

Adele Pring (Ed.) 1990/95, Women of the Centre (at pp 88-98, and 139-156). Pascoe Publishing 1990. Millie Taylor's chapter, 'Born Out Bush', provides considerable evidence of the acquisition and consumption of bush tucker at p146-7 and of sacred sites at p150 but otherwise the stories here are largely autobiographical rather than evidential. I have taken it into account.

Adele Pring (Ed.) 1998 Aboriginal Artists in South Australia. Department of Education, Training and Employment. Extracts relating to Millie Taylor, Eileen Wingfield and David (Daku) Brown. All three describe the acknowledgement and use of tjukurpa stories in their art, how the laws and customs inform their painting, and its utility in teaching culture. I have taken it into account.

Janet Skewes 31 July 1991, Emily Austin's Story. Coober Pedy Times. This article was of little relevance, its subject matter being largely unrelated to issues before me.

Consideration

Overall I have preferred to cite the first hand material which is available because it is more directly responsive to the issues which I must consider here. I have however also taken into account and relied upon the material referred to above, which usefully provided 'background' and context, as well as direct support for the affidavit material.

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

A sufficient factual base for this assertion is to be found in the affidavits as follows:

[Name Deleted] ; at paragraphs 4, 6, 9, 10, 11, 12, 13, 14, 17, 27, 28, 29, 35, 40, 42, 43, 44, 45 and 50.

[Name Deleted]; at paragraphs 6, 8, 15, 16, 17, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 39, 40, 41, 45, 46, 47, 48, 49, 50 and 52..

[Name Deleted]; at paragraphs 6, 9, 10, 11, 18, 19, 21 and 23.

[Name Deleted]; at paragraphs 3, 5, 6, 8, 10, 12, 13, 14, 16, 17, 18, 20, 22 and 24.

Department of Lands (Ed. R. Tynan) April 1998, Tallaringa Lands; Land Use Allocation Recommendations.

- (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;

A sufficient factual base for this assertion is to be found in the affidavits as follows:

[Name Deleted]; at paragraphs 10, 11, 13, 14, 16, 17, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 39, 40, 42, 43, 44, 45, 46, 48, 49, 50, 51 and 52

[Name Deleted]; at paragraphs 2, 3, 6, 8, 10, 15, 16, 17, 18, 19, 20, 21, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 47, 48, 49, 50, 51 and 52.

[Name Deleted]; at paragraphs 6, 9, 10, 11, 18, 19, 23.

[Name Deleted]; at paragraphs 3, 5, 6, 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 20, 22, 23 and 24

Janet Skewes (Ed.) 1997, Coober Pedylanguru Tjukurpa – Stories from Anagu of Coober Pedy.

Adele Pring (Ed.) 1990/95, Women of the Centre

Adele Pring (Ed.) 1998 Aboriginal Artists in South Australia.

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

A sufficient factual base for this assertion is to be found in the affidavits as follows:

[Name Deleted]; at paragraphs 10, 13, 14, 16, 17, 27, 28, 35, 36, 40, 42, 43, 44, 45, 48 and 50

[Name Deleted]; at paragraphs 6, 8, 15, 16, 17, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 37, 39, 40, 41, 45, 46, 47, 48, 49, 50 and 52

[Name Deleted]; at paragraphs 6, 9, 10, 11, 18, 19 and 23

[Name Deleted]; at paragraphs 3, 5, 6, 8, 10, 12, 13, 14, 16, 17, 18, 20, 22 and 24

Janet Skewes (Ed.) 1997, Coober Pedylanguru Tjukurpa – Stories from Anagu of Coober Pedy.

Adele Pring (Ed.) 1990/95, Women of the Centre

Adele Pring (Ed.) 1998 Aboriginal Artists in South Australia.

Prima facie case.

Section 190B(6):

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

Result

This condition is met.

Reasons relating to this condition

As I have found that a sufficient factual basis is provided for the assertion that the claimed native title rights and interests exist, it follows that I consider, for the reasons outlined above under s 190B(5) that at least some of the native title rights and interests can be prima facie established.

The rights and interests claimed are set out in Schedule E which is set out below.

1. The nature and extent of the native title rights and interests in relation to the determination area are the rights to use and enjoy the land and waters of the determination area in accordance with the traditional laws and customs being:
 - a) the right to access and move about the determination area;
 - b) the right to hunt on the determination area;
 - c) the right to gather and use the natural resources of the determination area such as food, medicinal plants, wild tobacco, timber, stone and resin;
 - d) the right to use the natural water resources on the determination area;
 - e) the right to live, to camp and to erect shelters on the determination area;
 - f) the right to cook on the determination area and to light fires for all purposes other than the clearance of vegetation;
 - g) the right to engage and participate in cultural activities on the determination area including those relating to births and deaths;
 - h) the right to conduct ceremonies and to hold meetings on the determination area;
 - i) the right to teach on the determination area the physical and spiritual attributes of

- locations and sites within the determination area;
- j) the right to maintain and protect sites and places of significance to Nguraritja under their traditional laws and customs on the determination area;
- k) the right to be accompanied on to the determination area by those people who, though not members of the native title claim group, are:
- i. spouses of members of the native title claim group,
 - ii. people required by traditional law and custom for the performance of ceremonies or cultural activities on the determination area,
 - iii. people who have rights in relation to the determination area according to the traditional laws and customs acknowledged by members of the native title claim group,
 - iv. people required by members of the native title claim group to assist in, observe, or record traditional activities on the determination area; and
- 1) The right to make decisions about the use and enjoyment of the determination area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by members of the native title claim group.

2. The native title rights and interests claimed are also subject to the effect of:

- a) all existing non-native title rights and interests (see, for example, those referred to in Schedule D); and
- b) all laws of South Australia made in accordance with section 19, 22F, 23E or 231 of the *Native Title Act*; to the extent that these are valid and applicable.

3. A right of exclusive possession is not claimed in relation to any area over which a previous non exclusive possession act has been made.

Following the injunctions of the High Court as expressed by the Full court in *Ward*⁴, I have read the claim to the rights 'to use and enjoy the lands and waters' as being a claim to non-exclusive possession with each of its incidents detailed so that the nature and extent of the rights are set out. There does not seem to me to be a claim for 'possession occupation use and enjoyment' (or the indicia of such a broad claim) such as would constitute a claim to exclusive possession. The incidents claimed are themselves non-exclusive in nature, in that there is no general assertion of, for example, rights to 'possession, occupation use and enjoyment', to control access, to 'speak for country' or an absolute right to determine the use and enjoyment of the lands. The only exception is the right at (k) which however does not make clear to me, either in the way it is drafted or by considering the evidence for it, whether it is sought in relation to persons within the claim group or against the world at large.

⁴ See *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283 at 17-23

This possible interpretation of Schedule E was drawn to the applicant's attention by way of a preliminary assessment provided pursuant to s. 78 on 31 October 2005.

I have nonetheless considered the material available to me to assess whether a claim to exclusive possession could be prima facie established, and if so on what basis. There is material in the affidavit of **[Name Deleted]** at paragraphs 50 and 51 and in the affidavit of **[Name Deleted]** at paragraphs 38 – 40 which partially evidences a right to control access to or use of country. I do not think that there is a prima facie case made out on that material for me to make a finding that the claimants can establish a right to exclusive possession.

I will now consider whether each incident as claimed may be prima facie established. Where a right has not been established the applicants have available the provisions of s 190(3A).

a) the right to access and move about the determination area;

This right is evidenced in the affidavits and other material as follows:

[Name Deleted]; at paragraphs 9, 10, 11, 12, 13, 14, 28 and 31

[Name Deleted]; at paragraphs 6, 8, 15-17, 20-24, 26, 27-34, 36-37, 39-41, 45-50 and 52

[Name Deleted]; at paragraphs 11 and 21

[Name Deleted]; at paragraphs 5-10, 12-145, 16-18, 20, 22 and 24

Established.

b) the right to hunt on the determination area;

This right is evidenced in the affidavits and other material as follows:

[Name Deleted]; at paragraphs 33, 35

[Name Deleted]; at paragraphs 28, 36, 37

[Name Deleted]; at paragraphs 7, 8

Adele Pring (Ed.) 1990/95, Women of the Centre. Millie Taylor's chapter, 'Born Out Bush', at p146-7.

Established.

c) the right to gather and use the natural resources of the determination area such as (a)food, (b)medicinal plants, (c)wild tobacco, (d)timber, (e)stone and (f)resin;

I have added the sub-paragraph lettering from (a) to (f) for clarity to show which aspects of this combined right may be established even though I have come to the conclusion that the right as framed cannot be established. I am not able to find any evidence for the use of resin, nor am I able to find sufficient material (such as, say, the use of spinifex) from which I could properly draw inferences about its use. Similarly, I am unable to find evidence for the use of timber other than as deposed to by **[Name Deleted]** at paragraph 26. The timber to which she refers is not on

the claim area.

Where a right is drafted with multiple sub-rights, as here, I do not believe that I can find it partially established, by excising one or more sub-rights, as to do so would be to effectively amend the applicants' claim

This right is partially evidenced in the affidavits and other material as follows. The letters (a) to (e) denote which of the sub-rights is so evidenced. This analysis may be useful should the applicants desire to exercise their rights under s 190(3A).

[Name Deleted]; at paragraphs 10(a), 25(c), 28(a), 31(a), 32(a) and 33(a)

[Name Deleted]; at paragraphs 28(a), 33(a), 33(b), 34(e), 36(a) and 37(a)

[Name Deleted]; at paragraphs 7(a), 8(a) and 9(b)

Not Established.

d) the right to use the natural water resources on the determination area;

This right is evidenced in the affidavits and other material as follows:

[Name Deleted]; at paragraph 28

[Name Deleted]; at paragraph 28 and 31

[Name Deleted]; at paragraph 7

Janet Skewes (Ed.) 1997, Coober Pedylanguru Tjukurpa – Stories from Anagu of Coober Pedy.

Established.

e) the right to live, to camp and to erect shelters on the determination area;

This right is evidenced in the affidavits and other material as follows:

[Name Deleted]; at paragraphs 9, 12 and 14

[Name Deleted]; at paragraphs 6, 8, 15-17, 20-24, 26-34, 36, 37, 39-41, 45-50 and 52

[Name Deleted]; at paragraphs 11 and 21

[Name Deleted]; at paragraphs 3, 5-10, 12-14, 16-18, 20, 22 and 24

Janet Skewes (Ed.) 1997, Coober Pedylanguru Tjukurpa – Stories from Anagu of Coober Pedy.

Established.

f) the right to cook on the determination area and to light fires for all purposes other than the clearance of vegetation;

Whilst it might be possible to draw inferences about the fact of using fire and cooking from the

everyday exigencies of living and hunting on country, the right is conditioned by the phrase 'for all purposes other than the clearance of vegetation' and I must therefore look for material going to all the components of the right as pleaded.

In the absence of any reasonably probative material I am unable to find this right established
Not Established.

g) the right to engage and participate in cultural activities on the determination area including those relating to births and deaths;

This right is evidenced in the affidavits and other material as follows:

- [Name Deleted]; at paragraphs 11, 28, 30-32, 35 and 49
- [Name Deleted]; at paragraphs 22-3, 26, 28, 30-34, 36-7, 39-41, 46 and 47
- [Name Deleted]; at paragraphs 5, 7-8, 10, 12-14, 16 and 22
- Adele Pring (Ed.) 1990/95, Women of the Centre
- Adele Pring (Ed.) 1998 Aboriginal Artists in South Australia.

Established.

h) the right to conduct ceremonies and to hold meetings on the determination area;

This right is evidenced in the affidavits and other material as follows:

- [Name Deleted]; at paragraph 11
- [Name Deleted]; at paragraphs 46-47
- [Name Deleted]; at paragraphs 10 and 16
- Janet Skewes (Ed.) 1997, Coober Pedylanguru Tjukurpa – Stories from Anagu of Coober Pedy.
- Adele Pring (Ed.) 1990/95, Women of the Centre
- Adele Pring (Ed.) 1998 Aboriginal Artists in South Australia.

Established.

i) the right to teach on the determination area the physical and spiritual attributes of locations and sites within the determination area;

This right is evidenced in the affidavits and other material as follows:

- [Name Deleted]; at paragraphs 28-29
- [Name Deleted]; at paragraphs 22-23, 28, 30-34, 36-7, 39-41 and 47
- [Name Deleted]; at paragraphs 8-10, 13 16 and 17

Established.

j) the right to maintain and protect sites and places of significance to Nguraritja under their traditional laws and customs on the determination area;

This right is evidenced in the affidavits and other material as follows:

[Name Deleted]; at paragraphs 32, 52 and 54

[Name Deleted]; at paragraphs 12 and 14

Established.

k) the right to be accompanied on to the determination area by those people who, though not members of the native title claim group, are:

- i. spouses of members of the native title claim group,
- ii. people required by traditional law and custom for the performance of ceremonies or cultural activities on the determination area,
- iii. people who have rights in relation to the determination area according to the traditional laws and customs acknowledged by members of the native title claim group,
- iv. people required by members of the native title claim group to assist in, observe, or record traditional activities on the determination area;

There is no real evidence of such rights. This right, being a 'composite' of a number of rights would need, at a minimum, to have evidence presented for each of its component parts.

Not Established.

1) The right to make decisions about the use and enjoyment of the determination area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by members of the native title claim group.

A right of this kind was established – on the evidence - in *De Rose*, and although the full Court in *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [141]-[151] cast some doubt on its general appropriateness, it conceded that where the laws and customs are of wider application than simply of the claim group such a right might be established. That is not made out here. The drafting of the right does not make clear to me whether it is intended to refer to persons within the claim group who

may not enjoy all rights in all parts of the claim area pursuant to the group's laws and customs, or whether it is a right asserted against the whole world. If it were to be asserted against the whole world (or at least those other persons who 'recognise themselves to be governed' by the groups laws and customs). Such factual material as is provided also does not assist in clarifying what is claimed.

Not Established.

Physical connection.

Section 190B(7):

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 have been expected currently to 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.

Result

This condition is met

Reasons relating to this condition

As I have found that a sufficient factual basis is provided for the assertion that the claimed native title rights and interests exist, it follows that I consider, for the reasons outlined above under s 190B(5), that members of the native title claim group have currently and previously had a traditional physical connection with the application area.

Further, the evidentiary material referred to and relied upon by me in considering s190B(5) and (6) provides ample evidence of an ongoing traditional connection.

No failure to comply with s. 61A.

Section 190B(8):

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s. 61A (which forbids the making of applications

where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

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 section 23B) was done in relation to an area; 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 provision as mentioned in section 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 section 23F) was done in relation to an area; 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 provision as mentioned in section 23E in relation to the act;a claimant application must not be made in which any of the native title rights and interests claimed confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
- 4 However, subsection (2) or (3) does not apply to an application if:
 - a. the only previous exclusive possession act or previous non-exclusive possession act concerned 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 section 47, 47A or 47B, as the case may be, applies to it.)

Result

This condition is met

Reasons relating to this condition

Because s.190B(8) asks the Registrar to test the application against s 61A, the decision below considers the application against that latter section.

Section 61A(1) no determinations of native title

A search of the Native Title Register has revealed that there is no determination of native title in relation to the area claimed in this application.

Section 61A(2): Previous exclusive possession acts [‘PEPAs’]

The application expressly identifies that the application area does not include areas covered by a previous exclusive possession act at Attachment B.

Section 61A(3): Previous Non-Exclusive Possession Acts [‘PNEPAs’]

It is stated in schedule E that no claim is made to exclusive possession over areas covered by any previous non-exclusive possession act. I have already determined that no claim to exclusive possession is made.

Conclusion

For the reasons as set out above I am satisfied that the application and accompanying documents do not disclose, and it is not otherwise apparent, that pursuant to s. 61A the application should not have been made.

No extinguishment etc. of claimed native title.

Section 190B(9)

Section 190B(9)(a)

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:

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

Result:

This condition is met.

Reasons relating to this condition

The application states in schedule Q (para (i)) that no claim is made to minerals, petroleum or gas wholly owned by the Crown.

Section 190B(9)(b)

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:

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

Result

This condition is met.

Reasons relating to this condition

The application does not cover offshore places.

Section 190B(9)(c)

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:

(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 subsection 47(2), 47A(2) or 47B(2)).

Result

This condition is met.

Reasons relating to this condition

The application and accompanying documents do not disclose, and it is not readily apparent, that the native title rights and interests claimed have not been extinguished by any mechanism, including:

- a break in traditional physical connection;
- non-existence of an identifiable native title claim group;
- by the non-existence of a system of traditional laws and customs linking the group to the area;
- an entry on the Register of Indigenous Land Use Agreements;
- Legislative extinguishment.

In addition, at Attachment B of the application, the applicant excludes any areas where native title rights and interests have otherwise been wholly extinguished. I am satisfied that because native title rights and interests must relate to land and waters (s.223 of the Act), the exclusion of particular land and waters is an exclusion of native title rights and interests over those lands and waters.

The application claims the benefit of s47, s 47A and s47B at Schedule L.

I do not have any information before me to find that the claimed native title rights and interests have otherwise been extinguished.

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