

*National Native Title Tribunal***REASONS FOR DECISION COVER SHEET
REGISTRATION TEST**

DELEGATE :	Jennifer Whyte
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APPLICATION NAME :	Eringa Native Title Claim
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NAME(S) OF APPLICANT(S) :

Edie King, Ruth McKenzie, Emily Churchill, Howard Doolan, Dean Ah Chee, Binji Lowe and Marilyn Hull
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NNTT NO	SC96/03
FEDERAL COURT NO	SG 6010 of 1998

REGION :	South Australia
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DATE APPLICATION MADE :	13 February 1996
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The delegate has considered the application against each of the conditions contained in s190B and s190C of the *Native Title Act* 1993.

DECISION

The application is ACCEPTED for registration pursuant to s190A of the *Native Title Act* 1993.

Jennifer Whyte

DELEGATE

DATE

Brief History of the application

The Eringa Native Title Determination Application was first made (lodged) on 13 February 1996 and registered that same day.

Through solicitors Johnston Withers, and on behalf of the applicants to the Eringa application in the far northern region of South Australia, amendments to the existing Native Title Determination Application were lodged in the Federal Court. Leave to amend the application was granted by the Federal Court on 27 May 1999. Leave to further amend the application was granted by the Federal Court on 6 October 1999.

All references to the 'amended application' in the present decision, unless otherwise stated, refer to the application as most recently amended.

Information considered in making the decision

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

- ◆ The Working Files, Registration Test Files, Legal Services Files and Federal Court Application and Amendment Files for SC96/3;
- ◆ Working files and related materials for native title applications that overlap the area of the Eringa application;
- ◆ Interested Persons files - Form 6 (Notice of Intention to Become a Party)
- ◆ The National Native Title Tribunal Geospatial Database;
- ◆ The Register of Native Title Claims;
- ◆ The Native Title Register;
- ◆ Determination of Representative ATSI Bodies: their gazetted boundaries;
- ◆ Submission from Commonwealth of Australia in relation to the registration of the application;
- ◆ Submission from the applicants' representative, Johnston Withers.
- ◆ Affidavits provided to the Tribunal by the applicants for the purpose of the registration test;
- ◆ Anthropological and heritage studies

Note: Information and materials provided in the context of mediation have not been considered in making this decision due to the without prejudice nature of those conferences and the public interest in maintaining the inherently confidential nature of such conferences.

REASONS FOR DECISION

A. Procedural Conditions

190C2	<p><i>Information, etc, required by section 61 and section 62:</i></p> <p><i>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.</i></p>
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Reasons for the Decision

I refer to the individual reasons for decision in relation to sections 61 and 62 set out below. For the reasons set out I find that the procedural requirements of sections 61 and 62 have been met. Accordingly, I find that the application meets the requirements of s190C(2).

Details required in section 61

61(3)	<i>Name and address for service of applicant(s)</i>	
Reasons relating to this sub-section	Application complies with the sub-section	
<p>The Federal Court Form 1 has been completed and sets out details of the applicants, their legal representative and address for service.</p> <p>I am satisfied there has been compliance with the procedural requirements of s61(3).</p>		

61(4)	<i>Names persons in native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons</i>	
Reasons relating to this sub-section	Application complies with the sub-section	
<p>An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of s61(4)(a) are not met.</p> <p>However, I find that the requirements of s61(4)(b) have been met in that the description at Schedule A of the application describes the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons. Refer also to these reasons for decision in relation to s190B(3).</p> <p>I am satisfied there has been compliance with the procedural requirements of s61(4).</p>		

61(5)	<i>Application is in the prescribed form¹; lodged in the Federal Court, contains prescribed information², and accompanied by prescribed documents and fee</i>
Reasons relating to this sub-section	Application complies with the sub-section
<p>As required by s61(5)(a), the application is in the form prescribed by Regulation 5(1)(a) Native Title (Federal Court) Regulations 1998.</p> <p>As required under s61(5)(b), the amended application was filed in the Federal Court. The pre-amended application was given to the Native Title Registrar, as mentioned in s61 of the (unamended) Act and is therefore taken to have been made to the Federal Court in accordance with Table A (Application, Savings or Transitional Provisions), Schedule 5, Part 3, item 6, case 3.</p> <p>The application meets the requirements of s61(5)(c) and contains all information as prescribed in s62. I refer to my reasons for decision in relation to those sections.</p> <p>As required by s61(5)(d) the application is accompanied by the prescribed documents, being:</p> <ul style="list-style-type: none"> • affidavits, as prescribed by s62(1)(a); and • a map, as prescribed by s62(1)(b). <p>I refer to my reasons for decision in relation to those sections.</p> <p>I note that s190C(2) only requires me to consider details, other information, and documents required by s61 and s62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.</p> <p>I am satisfied there has been compliance with the procedural requirements of s61(5).</p>	

Details required in section 62(1)

62(1)(a)	<i>Affidavits address matters required by s62(1)(a)(i) – s62(1)(a)(v)</i>
Reasons relating to this sub-section	Application complies with the sub-section
<p>Each of the applicants have sworn an affidavit, identical in content, in order to address the matters required by s62(1)(a)(i) – s62(1)(a)(v).</p> <p>The affidavits identify the deponents by name, address and occupation. All have been signed by the deponent, date and witnessed by a person qualified to do so.</p>	

¹ Note that in relation to pre 30.09.98 applications, the application does not need to be in the prescribed form as required by the amended *Act*. Note also that pre 30.09.98 applications are deemed to have been filed in the Federal Court.

² Note also that “prescribed information” is that which is required by s62 as set out in the text of this reasons document under “Details required in section 62(1)”.

The affidavits meet all the requirements of s62(1)(a)(i) to s62(1)(a)(v), at paragraphs (a) to (e) respectively.

I am satisfied there has been compliance with the procedural requirements of s62(1)(a).

62(1)(c)	<i>Details of traditional physical connection (information not mandatory)</i>
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Comment on details provided

It is not a mandatory requirement that details of traditional physical connection are contained in the application for the purposes of s62(1)(c).

However, some details have been provided in the application at Schedules G and M.

There is also additional information, provided by way of further information, from members of the claim group which outlines aspects of traditional physical connection.

Details required in section 62(2) by section 62(1)(b)

62(2)(a)(i)	<i>Information identifying the boundaries of the area covered</i>
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Reasons relating to this sub-section

Application **complies** with the sub-section

A written description of the external boundary of the area claimed has been included at Schedule B and Attachment B1 of the amended application.

A map of the area claimed, depicting the external boundary, is also included in the amended application at Attachment C.

For the reasons set out in relation to s190B(2) I am satisfied that this information is sufficient to meet the requirements of s62(2)(a)(i).

I am satisfied there has been compliance with the procedural requirements of s62(2)(a)(i).

62(2)(a)(ii)	<i>Information identifying any areas within those boundaries which are not covered by the application</i>
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Reasons relating to this sub-section

Application **complies** with the sub-section

At Schedule B and Attachment B the applicants have provided a written description, identifying the areas within the external boundaries of the area claimed that are not covered by the application.

Schedule B and Attachment B describes, by way of formula, land tenure specifically excluded from the claim area.

For the reasons set out in relation to s190B(2) I am satisfied that this information is sufficient to meet the requirements of s62(2)(a)(ii).

I am satisfied there has been compliance with the procedural requirements of s62(2)(a)(ii).

62(2)(b)	<i>A map showing the external boundaries of the area covered by the application</i>
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Reasons relating to this sub-section	Application complies with the sub-section
<p>A map, depicting the external boundary of the application is attached to the application at Attachment "C".</p> <p>For the reasons set out in relation to s190B(2) I am satisfied that the map is sufficient to meet the requirements of s62(2)(b).</p> <p>I am satisfied there has been compliance with the procedural requirements of s62(2)(b).</p>	

62(2)(c)	<i>Details/results of searches carried out to determine the existence of any non-native title rights and interests</i>
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Reasons relating to this sub-section	Application complies with the sub-section
<p>The requirements of s62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that I need only be informed of searches conducted by the applicant, in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect applicants to have knowledge of and obtain details about all searches carried out by every other person or body.</p> <p>Schedule D of the application outlines details of searches of which the applicants are aware in relation to the existence of any non-native title rights and interests within the claim area. Details of searches provided to the applicants by the State of South Australia are attached to the application at Attachment D.</p> <p>Attachment D to the Eringa application consists of spreadsheet information which details non-native title interests within the claim area, including land parcel number attributed to the ares.</p> <p>There is no information to which I must have regard that contradicts this information.</p> <p>I am satisfied there has been compliance with the procedural requirements of s62(2)(c).</p>	

62(2)(d)	<i>Description of native title rights and interests claimed</i>
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Reasons relating to this sub-section	Application complies with the sub-section
<p>This condition requires the application to contain:</p> <ol style="list-style-type: none"> 1. a description of the native title rights and interests claimed; and 2. details of any activities carried out by members of the native title claim group in exercise of those rights and interests. <p>Further, this section requires the description to not merely consist of a statement to the effect that the native title rights and interests are all those that may exist or that have not been extinguished at law.</p> <p>A description of the native title rights and interests claimed is provided at Schedule E of the application. The contents of Schedule E are included under s190B(4) and s190B(6) of this decision. The description includes a list of four generic rights and interests which are then particularised into ten specific rights and interests. I interpret this to be a complete list rather than a non-exhaustive list of particulars of some larger right.</p> <p>In accordance with the requirements of s62(2)(d), the rights and interests claimed do not merely consist of a statement to the effect that the rights and interests are all those that may exist or that have not been extinguished at common law.</p> <p>In my view the rights and interests specified by the applicants are defined in a sufficiently clear manner so as to be readily identifiable.</p> <p>Additionally, Schedule G identifies some of the activities members of the native title claim group continue to undertake in relation to the land and waters within the claim area. (Refer also to these reasons for decision in relation to s62(2)(f)) These activities constitute a general description of activities in exercise of the rights and interests claimed by the applicants.</p> <p>I am satisfied there has been compliance with the procedural requirements of s62(2)(d).</p>	

Preface to s62(2)(e)

62(2)(e)	<i>Application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist</i>
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Reasons relating to this sub-section	Application complies with the sub-section
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This section requires satisfaction that the application contains a description of the factual basis on which it is asserted that the native title rights and interests claimed exist. The description must include each of the three elements identified in the sub-sections 62(2)(e)(i), (ii) and (iii). A consideration of the extent or sufficiency of the description is not required. That inquiry is conducted in relation to s190B(5).

I find that there is a general description of the factual basis set out in Schedule F of the application. I note further that some details of activities carried out by members of the native title claim group are provided in Schedule G of the application and this information supplements the general description at Schedule F.

I refer to the separate reasons set out below in relation to each of the particular facts identified in each of s62(2)(e)(i), (ii) and (iii). As set out below, I find that each of the particular facts required are included in the general description of the factual basis set out in the application.

I am satisfied there has been compliance with the procedural requirements of s62(2)(e).

62(2)(e)(i)	<i>Factual basis – claim group has, and their predecessors had, an association with the area</i>
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Reasons relating to this sub-section	Application complies with the sub-section
<p>The factual basis for the assertion that the native title claim group has, and their predecessors had, an association with the area, is outlined at Schedule F of the application. I have detailed the contents of Schedule F in this decision at s190B(5). Further information supporting this assertion is also contained at Schedules A, G and M of the application.</p> <p>I am satisfied that the application sets out a general description of the factual basis on which the asserted native title rights and interests claimed exist.</p> <p>I am satisfied there has been compliance with the procedural requirements of s62(2)(e)(i).</p>	

62(2)(e)(ii)	<i>Factual basis – traditional laws and customs exist that give rise to the claimed native title</i>
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Reasons relating to this sub-section	Application complies with the sub-section
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The factual basis for the assertion that traditional laws and customs exist that give rise to the claimed native title is outlined at Schedule F of the application. I have detailed the contents of Schedule F in this decision at s190B(5). Further information supporting this assertion is also contained at Schedules A, G and M of the application.

I am satisfied that the application sets out a general description of the factual basis on which the asserted native title rights and interests claimed exist.

I am satisfied there has been compliance with the procedural requirements of s62(2)(e)(ii).

62(2)(e)(iii)	<i>Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs</i>
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Reasons relating to this sub-section	Application complies with the sub-section
<p>The factual basis for the assertion that the native title claim group has continued to hold native title in accordance with traditional laws and customs is outlined at Schedule F of the application. I have detailed the contents of Schedule F in this decision at s190B(5). Further information supporting this assertion is also contained at Schedules A, G and M of the application.</p> <p>I am satisfied that the application sets out a general description of the factual basis on which the asserted native title rights and interests claimed exist.</p> <p>I am satisfied there has been compliance with the procedural requirements of s62(2)(e)(iii).</p>	

62(2)(f)	<i>If native title claim group currently carry on any activities in relation to the area claimed, details of those activities</i>
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Reasons relating to this sub-section	Application complies with the sub-section
<p>The application provides general details of activities that the native title claim group undertake in relation to the area claimed. Schedule G states:</p> <p><i>Members of the native title claim group continue to possess, occupy, use and enjoy the claim area, including (amongst other things) by:</i></p> <ul style="list-style-type: none"> • <i>living and camping in the claim area;</i> • <i>erecting dwellings and other shelters in the claim area;</i> • <i>hunting, gathering, preparing and cooking bush food, medicinal and other resources in the claim area;</i> • <i>working in the claim area and undertaking activities in the claim area for economic benefit;</i> • <i>maintaining and protecting the natural environment in the area including springs and other water sources;</i> 	

- *making decisions with respect to the use and management of the claim area;*
- *taking care of Aboriginal sites in the area and protecting them from damage (eg from mining and construction work), including burial sites;*
- *conducting meetings and other gatherings in the area;*
- *conducting traditional ceremonies and cultural activities in the area;*
- *visiting the area with their children and teaching their knowledge of the language, culture, heritage and tradition associated with the area to their children;*
- *educating others in the culture, heritage and language associated with the area, and otherwise protecting and preserving such culture and heritage;*
- *trading in certain resources from the area.*

There is also additional information contained at Schedules F and M of the application and in affidavit evidence (discussed in relation to s190B(5), s190B(6) and s190B(7)).

This section requires details of current activities. I do not regard this as requiring an exhaustive or minute description of activities. Rather, I find a general description that traditional law business and customary activities are carried out, together with the (non-exhaustive) particulars of these activities, to constitute sufficient detail as required by this section.

I consider that the identified activities of the group in relation to the claim area are described in general terms by Schedule G.

I am satisfied there has been compliance with the procedural requirements of s62(2)(f).

62(2)(g)	<i>Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)</i>
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Reasons relating to this sub-section	Application complies with the sub-section
<p>Details are provided at Schedule H of the amended application.</p> <p>Only one application is listed as overlapping the Eringa application; namely, Wangkanguru/Yarluyandi, (SC97/3) SG 6016/98. This native title application is also a matter before the Federal Court.</p> <p>I have also referred to a list of native title applications that currently overlap the Eringa application, obtained from the Tribunal's Geospatial Database. This list was current at the time of making this decision.</p> <p>The information contained at Schedule H of the application is consistent with the Tribunal's Geospatial records.</p> <p>I am satisfied that the details of overlapping applications of which the applicants are aware have been included at Schedule H.</p> <p>I am satisfied there has been compliance with the procedural requirements of s62(2)(g).</p>	

62(2)(h)	<i>Details of any S29 Notices (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of</i>
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Reasons relating to this sub-section	Application complies with the sub-section
<p>Section 62(2)(h) requires the application to contain the details of any notices under s29 (or State law equivalent) of which the applicants are aware.</p> <p>Schedule I of the application provides details of all such notices that have been given and relate to the whole or part of the area since 30 September 1998. The details are consistent with the knowledge of the Tribunal.</p> <p>In addition, the applicants provide details of the notices, of which they are aware, given prior to 30 September 1998.</p> <p>I am satisfied that Schedule I addresses this condition appropriately.</p> <p>I am satisfied there has been compliance with the procedural requirements of s62(2)(h).</p>	

190C3	<p><i>Common claimants in overlapping claims:</i></p> <p><i>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:</i></p> <p><i>(a) the previous application covered the whole or part of the area covered by the current application; and</i></p> <p><i>(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</i></p> <p><i>(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.</i></p>
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This condition has no operation. I set out my reasoning as follows:-

Reasons for the Decision

<p>In assessing the Eringa application against this condition I have relied primarily upon information obtained from the Tribunal's Geospatial Unit.</p> <p>At the time of making this decision there was only one application on the Register of Native Title Claims overlapping with the Eringa application; being:</p> <ul style="list-style-type: none"> ▪ SG 6016 of 1998 Wangkanguru/Yarluyandi – (SC97/3) <p>In the case where there is a person who is included in the native title claim group and who is also a member of the claim group for an overlapping application, the current application will fail to meet the conditions of s190C(3) if:</p> <p>a) the previous application covered the whole or part of the area covered by the</p>

- application and
- b) an entry relating to the claim in the in the previous application was on the Register of Native Title Claims at the time the application was made and
 - c) the entry was made or not removed as a result of passing the registration test

Each of these pre-conditions must be met before an application will fail this condition.

In respect of the overlapping application detailed above, all three pre-conditions are not so met.

The Eringa application was made on 13 February 1996 and entered on to the Register of Native Title Claims on the same day. The Wangkanguru/Yarluyandi application was lodged subsequently, on 21 August 1997 and registered that day. The application has yet to undergo the registration test.

Consequently, s190C(3) has no operation with respect to the Eringa application.

I note that Schedule O of the Eringa application specifically acknowledges the overlap with Wangkanguru/Yarluyandi and the potential for common claim group membership. To this extent, Schedule O states:

It is asserted that no members of the native title claim group for this application will be a member of the native title claim group for any "previous application" for the purpose of s190C(3) of the Native Title Act.

If, however, it is determined that one or more member(s) of the native title claim group for this application would be (but for the following) be member(s) of the native title claim group for the Wangkanguru/Yarluyandi native title claim (SG 6016/98), and it is determined that that claim is a "previous application", then such member(s) is (or are) hereby excluded from the native title claim group for this application.

Given that the Wangkanguru/Yarluyandi application is not a "previous application", for the reasons detailed above, I have not considered the operation of Schedule O.

190C4(a) and 190C4(b)	<p>Certification and authorisation:</p> <p>The Registrar must be satisfied that either of the following is the case:</p> <ul style="list-style-type: none"> (a) <i>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</i> (b) <i>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.</i>
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I am satisfied that the application meets this condition and set out my reasoning as follows:-

Reasons for the Decision

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In applying this condition I have had regard to the certificate provided by the applicants, the gazetted representative body boundaries and a plan produced by the Tribunal's Geospatial Unit showing those boundaries and the intersection with the Eringa application boundary.

The applicants seek to rely upon certification of the application, pursuant to s190C(4)(a), by the Aboriginal Legal Rights Movement Inc (hereafter referred to as "ALRM"). The certificate is dated 15 June 1999 and has been signed by the Director of the ALRM.

In accordance with the requirements of s202(5) the certificate states that, on behalf of all the persons in the native title claim group, the applicants have the authority to make the application and deal with matters arising in relation to it. The certificate also states that all reasonable efforts have been made to ensure the application describes or otherwise identifies all the other persons in the native title claim group. The certificate outlines the reasons through which ALRM has reached these conclusions.

The certificate also details what the representative body has done to meet the requirements of s202(6).

In meeting the requirements of s202(5) and s202(6) the certificate meets all the requirements of s202(7).

ALRM has determined representative body status for the whole of the State of South Australia, except for those areas determined as Anangu Pitjantjatjara and Maralinga Tjarutja. The plan produced by the Tribunal's Geospatial Unit confirms the Eringa application does not extend into the area of either Anangu Pitjantjatjara or Maralinga Tjarutja. As such, I find the ALRM certificate is sufficient to comply with the requirements of the conditions contained in s190C(4)(a).

Conclusion

The certificate provided by ALRM meets the formal requirements of s190C(4)(a).

There is no other information before me, to which I must have regard, which contradicts the certification.

I am satisfied the application meets this condition.

190C5	<p><i>Evidence of authorisation:</i></p> <p><i>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:</i></p> <p><i>(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and</i></p> <p><i>(b) briefly sets out the grounds on which the Registrar should consider that it has been met.</i></p>
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I have not considered the application against this condition and set out my reasoning as follows:-

Reasons for the Decision

The application has been certified by ALRM in accordance with the requirements of s190C(4)(a). Consequently, I am not required to consider this condition.

B. Merits Conditions

190B2	<p><i>Description of the areas claimed:</i></p> <p><i>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.</i></p>
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I am satisfied that the application meets this condition and set out my reasoning as follows:-

Reasons for the Decision

In applying this condition I have given primary consideration to the Eringa application and the prescribed accompanying map as well as information generated by the Tribunal's Geospatial Information Unit.

In order for the application to meet the requirements of this section I must be satisfied that the information and map contained in the application, as required by s62(2)(a) and s62(2)(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.

At Schedule B the application contains the following:

Map and External Boundary Description

Information identifying the area covered by the application is provided at Schedule B and attachments labelled Attachment B1 and Attachment C.

A technical description of the application's external boundaries is provided in the application at Schedule B. The description references pastoral lease boundaries as well as those of the Witjira National Park and South Australia / North Territory. The description at Schedule B stipulates that references to pastoral boundaries are "references to those boundaries as at September 1993". The description also contains references to geographic coordinates.

In addition, Attachment B1 consists of a list of coordinates, describing the external boundary of the application. This list of coordinates was prepared by the Tribunal's Geospatial Information Unit on 20 September 1999 as part of approved s78 Assistance

to Applicants.

I am satisfied that the description meets the requirements of s62(2)(a)(i).

The map attached to the application at Attachment C, showing the external boundaries of the application, was also produced by the Geospatial Information Unit on 20 September 1999. The map includes latitude and longitude points, based on Australian Geodetic Datum 1966, and a scale. All the line work on the map is finely drawn and easy to follow. In the bottom left hand corner of Attachment C, the general locality of the mapped area is shown within the State of South Australia.

I am satisfied the map meets the requirements of s62(2)(b).

The applicants, at Schedule B, make provision for the event of any inconsistency identified between the description at Schedule B and coordinates at Attachment B1. The applicants stipulate that in the case of any such inconsistency the coordinates shall prevail.

A comparison of the external boundary described at Schedule B and coordinates at Attachment B1 has been conducted by the Tribunal's Geospatial Information Unit. The Unit confirms there is no inconsistency between the descriptions. Further, the Tribunal's Geospatial Unit confirms that the map is also consistent with the written and coordinate descriptions.

I am satisfied the requirements of s62(2)(a)(i) have been met in that the application contains information, by physical description and otherwise, enabling the boundaries of the area covered by the application to be identified. I am similarly satisfied the requirements of s62(2)(b) have been met in that the map shows the boundaries of the area mentioned in s62(2)(a)(i).

Internal boundary description

The internal boundaries of the application are detailed at Schedule B, through Attachment B. At Attachment B the applicants set out, by way of formula, the areas within the external boundaries that are not covered by the application.

The applicants have not identified, parcel by parcel, the areas of land and waters that are excluded from the claim area. In my view that is not required to satisfy the requirements of s62(2)(a)(ii) or s190B(2).

The internal boundaries are described by way of identifying classes of land tenure that are not covered by the application. The description of areas excluded can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. This may require considerable research in relation to tenure data held by the particular custodian of that data. Nevertheless, it is reasonable to assume that the task can be done on the basis of the information provided by the applicants.

I note that the exclusions cited in the application are said to be subject to the provisions of s47, s47A and s47B. I note also that the applicants have specifically included the area the subject of a lease between the Minister for the Environment and Natural Resources and Irrwanyere Aboriginal Corporation dated 5 October 1995. The applicants provide reasons for the inclusion of this area and also contend, at Schedule L, that this lease attracts the benefit of s47. Further particulars of tenure or other

factors allowing the applicants to claim the benefit of these provisions is not provided. However, I am satisfied that the formula provided allows it to be shown objectively whether the applicants may have benefit of these provisions.

Whether the exclusions identified by this formula are sufficient to meet the conditions at s190B(8) and s190B(9) is not considered here. I refer to my reasons for decision with respect to those sections.

I am satisfied the requirements of s62(2)(a)(ii) have been met in that the application contains information enabling the identification of any areas within the boundaries, as mentioned in s62(2)(a)(i), that are not covered by the application.

I refer to a submission from the Commonwealth of Australia dated 14 January 1999 in relation to the registration of the Eringa application. The Commonwealth appears to contend that there is uncertainty with respect to the internal boundaries of the application because the map shows areas of excluded tenure. The Commonwealth quotes the requirements of s190B(2). I note the submission was made prior to the amendment of the application and for the reasons detailed above I find there has been compliance with s62(2)(a) and s62(2)(b).

Conclusion

I am satisfied that, taken together, the information and map contained in the application, as required by s62(2)(a) and s62(2)(b), are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed with respect to a particular area.

It is my view that the application meets the requirements of this condition.



190B3	<p><i>Identification of the native title claim group:</i></p> <p><i>The Registrar must be satisfied that:</i></p> <p>(a) <i>the persons in the native title claim group are named in the application; or</i></p> <p>(b) <i>the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.</i></p>
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I am satisfied that the application meets this condition and set out my reasoning as follows:-

Reasons for the Decision

An exhaustive list of names of the persons in the native title claim group has not been provided and so the requirements of s190B(3)(a) of the Act are not met.

In the alternative, pursuant to s190B(3)(b), the application must describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Schedule A of the application defers to Attachment A which sets out the description of

the native title claim group:

Essentially, membership of the Eringa native title claim group is described by two means:

- 1 biological descent from named ancestors; or
- 2 acknowledgment and incorporation in accordance with traditional laws and customs.

The description at Attachment A specifically names the group's antecedents and their biological descendants. I consider that the names provided for each person are sufficient to identify the relevant person and that, with minimal inquiry, it is possible to ascertain whether a person is a descendant of one of those named. I am satisfied this limb of the description is sufficient.

The description also identifies those people included in the native title claim group through traditional means of incorporation and provides details of their incorporation. In addition, Attachment A includes a description of the traditional principles of incorporation into the Eringa native title claim group. I am satisfied that this limb of the description is also sufficient.

In considering this condition I have also had regard to several affidavits.

Each of the deponents are named at Attachment A of the claim group description. The deponents also identify those persons from whom they are descended. I note the information contained in the affidavits is consistent with the details contained at Attachment A.

Conclusion

In my view there is no information to which I must have regard pursuant to s190A(3) of the Act that indicates the list of ancestors provided in the application is deficient, either in terms of clearly identifying the individuals or in terms of providing an exhaustive list of ancestors. Thus, I consider that the description provides a sound mechanism whereby it can be ascertained whether any particular person is a member of the claim group.

The requirements of this condition are met.



190B4	<p><i>Identification of claimed native title</i></p> <p><i>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 be readily identified.</i></p>
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I am satisfied that the application meets this condition and set out my reasoning as follows:-

Reasons for the Decision

In applying this condition I have had regard to the amended Eringa application.

At Schedule E of the application the native title rights and interests are described as follows:

The native title rights and interests claimed are the rights and interests of common law holders of native title derived from and exercisable by reason of the existence of native title. The generic aspects of the rights and interests claimed are:

- (i) the right to possess, occupy, use and enjoy the claim area;*
- (ii) the right to exercise responsibility under traditional law and custom for the management, care and maintenance of the claim area;*
- (iii) the right to control, maintain and transmit cultural and ritual knowledge associated with the claim area in accordance with traditional law and custom;*
- (iv) the capacity to transmit in accordance with traditional law and custom the right to possess, occupy, use and enjoy the claim area and the rights which flow from that to others, including by virtue of the principles of descent.*

All native title rights and interests which flow from the above are claimed. They include:

(a list of ten particularised rights and interests are then outlined under four headings reflecting the four generic points above; they being:

Occupation and Economic (four rights and interests listed); Control and Management (two rights and interests listed); Cultural (three rights and interests listed); and Membership (one right and interest listed)

I refer also to my reasons for decision in relation to s62(2)(d). In accordance with the requirements of that section the rights and interests claimed are not merely a statement to the effect that they are all those rights and interests that may exist or that have not been extinguished at law. Each of the native title rights and interests claimed is readily identifiable.

I note that the right to possession, occupation, use and enjoyment is a right identified in *Mabo v Queensland (No 2) (1992) 175 CLR 1*. This right is known to the law and has been regarded by the High Court of Australia as capable of identification.

In addition, I note that the applicants have sought to limit the claimed native title rights and interests. Specific tenures have been excluded from the application by virtue of the internal boundary description at Schedule B. The applicants further qualify the rights and interests claimed by stating that the claimed rights and interests are subject to all existing non-native title rights and interests and laws in South Australia made in accordance with ss19, 22F, 23E or 23I of the *Native Title Act*. Further, Schedule Q of the application states that “no claim is being made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by the Crown under valid laws of the Commonwealth or of the State of South Australia”.

Essentially, these limitations qualify the applicants’ claim to exclusive possession of the claim area where such a claim cannot be made; the effect of this being that the claimed rights and interests are not inconsistent with the validly granted rights and interests of others with respect to the claim area.

I am satisfied that the application meets the requirements of this condition.

190B5	<p>Sufficient factual basis:</p> <p><i>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:</i></p> <p><i>(a) that the native title claim group have, and the predecessors of those persons had, an association with the area;</i></p> <p><i>(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;</i></p> <p><i>(c) that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs.</i></p>
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I am satisfied that the application meets this condition and set out my reasoning as follows:-

Reasons for the Decision

In making this decision I have had specific regard to affidavits and heritage reports, provided to the Tribunal by the applicants as further information to address the conditions of the registration test, and the amended Eringa application.

Schedule F of the application sets out a series of statements which seek to address the assertions set out in s190B(5):

The native title rights and interests are those of and flowing from the right to possession, occupation, use and enjoyment of the land pursuant to the traditional laws and customs of the claim group based upon the following facts:

- 1. the native title claim group and the ancestors have, since the assertion of British sovereignty possessed, occupied, used and enjoyed the claim area; and*
- 2. such possession, occupation, use and enjoyment has been pursuant to and possessed under the laws and customs of the claim group, including traditional laws and customs that rights and interests in land and waters vest in members of the native title claim group on the basis of:*
 - descent from ancestors connected to the area;*
 - birth in the area;*
 - traditional religious knowledge of the area;*
 - traditional knowledge of the geography of the area;*
 - traditional knowledge of the resources of the area;*
 - knowledge of traditional ceremonies of the area.*
- 3. such traditional law and custom has been passed by traditional teaching, through the generations preceding the present generations to the present generations of persons comprising the native title claim group;*
- 4. the native title claim group continues to acknowledge and observe those traditional laws and customs;*
- 5. the native title claim group by those laws and customs have a connection with the land in respect of which the claim is being made;*

6. *the rights and interests are capable of being recognised by the common law of Australia.*

Schedule G also contains details of activities undertaken by members of the native title claim group in relation to the claim area. (Refer also to these reasons for decision at s62(2)(f)).

Under s190B(5) I am not restricted to considering information contained only in the application. Consequently, I have also had regard to several affidavits and other information provided under cover of a submission from the applicants' representative, Johnston Withers, dated 31 May 1999, including:

- Department of Environment and Natural Resources (1993), *Witjira National Park: Draft Management Plan*;
- Department of Environment and Natural Resources (1995), *Witjira National Park: Management Plan*;
- "Keeping Culture Strong: Witjira National Park Heritage and Management". Draft publication funded by the National Estates Grant Program;
- Doohan, Kim (1992), *One Family, Different Country: The development and persistence of an Aboriginal Community at Finke, Northern Territory*, Oceania Monograph 42: University of Sydney;
- McKenzie, Ruth, "It was Cruel", in Pring, Adele (ed) (1990), *Women of the Centre*, Pascoe Publishing: Apollo Bay;
- Woenne-Green, Susan et al (1994), *Competing Interests: Aboriginal Participation in National Parks and Conservation Reserves in Australia*, Corgi Printing: Maroochydore

This section requires that I be satisfied that there is sufficient factual basis to support three specific assertions. They are considered in turn.

s190B(5)(a) - the native title claim group have, and the predecessors of those persons had, an association with the area

To be satisfied of this criterion it must be evident that the native title claim group have and their predecessors had an association with the area which was and remains communal; that is, shared by members of the native title claim group.

The information contained at Schedules F and G of the amended application asserts an association with the claim area as required and provides general details of activities undertaken by members of the native title claim group in relation to the claimed area.

Further evidence supporting the assertion is contained in the affidavits and heritage studies, listed above.

Each of the deponent's identify as persons of either Lower Southern Arrernte or Luritja/Yankunytjatjara/Antakirinja descent and depose to their relationship with some of those named as ancestors at Schedule A.

Further, the deponent's refer to their spiritual connection to the area and to having been passed on knowledge about the country from their ancestors. The deponent's also identify some of the named ancestors as having recognised authority for the area.

The affidavit evidence provides details of association across the area of the application, from Tieyon in the west, east to the Finke floodplain and south to Macumba. I note

also that the deponents either continue to live in the area or regularly return to the area to participate in cultural activities.

The heritage reports support the affidavit material and provide extensive additional evidence of the physical and spiritual association of the area by the forbears of the current native title claim group.

The *Witjira National Park Management Plan*, for example, states that Witjira “makes up part of the lands associated with Lower Southern Arrernte and Wangkangurru people” who “have a strong spiritual attachment to the land and regard it as an area for which they have a management responsibility”. The report also acknowledges that the association of the present native title claim group arises from “their status as descendants of the Park’s original inhabitants”.

Further, the reports states that

[r]ecent archaeological evidence establishes Aboriginal occupation of the area as dating from the late Holocene; that is approximately three thousand years before the present. Contemporary Lower Southern Arrernte and Wangkangurru people insist that Aboriginal people have always been there; their ancestry takes them to the altyerre, otherwise known today as “the Dreaming”. Their association with the land is expressed in their knowledge of the land’s spiritual significance; their social and personal responsibility to take care of it.

The *Keeping Culture Strong* publication also provides numerous specific examples of the association of the native title claim group’s forbears with the area of the application. This includes evidence of occupation through campsites and artefacts and spiritual association through the recording of many places of significance, “*Tjukurpa* or ‘Dreaming stories’”.

On the basis of the above considerations I find that the factual basis upon which it is asserted that the native title claim group have, and their predecessors had, an association with the area is sufficient to support the assertion.

The requirements of s190B(5)(a) are met.

s190B(5)(b) – 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

To be satisfied of this criterion it must be evident that traditional laws and customs exist, that those laws and customs are acknowledged and observed by the native title claim group and that those laws give rise to the claim to native title rights and interests.

The information contained at Schedules F and G of the amended application asserts the existence, acknowledgment and observation of traditional laws and customs as required and provides general details of activities undertaken by members of the native title claim group in exercise of those laws and customs. These activities are, in turn, linked to the claimed native title rights and interests.

Further evidence supporting the assertion is contained in the affidavits and heritage studies, listed above.

Each of the deponents refer to a body of traditional laws and customs that exist which are duly acknowledged and observed by the native title claim group. The deponents state that knowledge about features of the application area have been passed to them

by their forbears, as has the associated spiritual meaning of those places.

The deponent's evidence suggests that the existence of traditional laws and customs impacts on all aspects of life for the Eringa native title claim group. The deponents provide numerous examples of the traditional laws and customs informing all activities, including the collection and preparation of foods, the way in which people relate to one another, access to particular areas and whether certain knowledge is passed on. The affidavit evidence also indicates that the laws and customs dictate the areas for which people have responsibility.

The heritage studies support the affidavit material and provide extensive additional evidence of the existence, acknowledgment and observation of traditional laws and customs.

The extract from *Women of the Centre*, details the life story of Ruth McKenzie who, I note, is also one of the deponents. In this extract Ms McKenzie recounts a particular example of tribal punishment.

The *Witjira National Park Management Plan* makes reference to an anthropological study which confirmed the traditional role of the people associated with the area and documented the cultural basis of this association. The Management Plan also supports the assertion that the traditional laws and customs of the Eringa native title claim group permeate all aspects of life:

"For Aboriginal people in Central Australia the land with which they are associated has a complex array of interconnected meanings and values. The significance of land is emphasised throughout an individual's life; at birth, at play, while hunting, camping, travelling and celebrating, and in death. The land is known by means of direct telling, and by song and other religious sacra, transmitted over generations."

On the basis of the above considerations I find that the factual basis upon which it is asserted 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 is sufficient to support the assertion.

The requirements of s190B(5)(b) are met.

s190B(5)(c) – the native title claim group have continued to hold the native title in accordance with those traditional laws and customs

To be satisfied of this criterion it must be evident that the native title claim group have continued to hold native title in accordance with their traditional laws and customs.

The information contained at Schedules F and G of the amended application assert the continuing practice of activities in relation to the area of the application according to the doctrines of traditional law and custom.

Further evidence supporting the assertion is contained in the affidavits and heritage studies, listed above.

The deponents refer to activities undertaken, in accordance with traditional law and custom, with younger members of the native title claim group, through which knowledge of the country is passed on.

The deponents also make reference to their participation in "Work Area Clearances" so

as to ensure that areas of significance within the application area are protected. The deponents state the participation in Work Area Clearances also ensures that areas restricted to senior men or women are not damaged.

In addition, the deponents refer to having a responsibility to maintain a physical and spiritual connection to the application area. The deponents state that this connection is maintained through, for example, residing within the claim area, participating in traditional ceremonies and continuing to collect and prepare bush foods in accordance with traditional law and custom.

The *Witjira National Park Management Plan* also makes specific provision for a process whereby the people who have traditional association are consulted “about cultural interests in cases where developments are being planned for the Park”.

On the basis of the above considerations I find that the factual basis upon which it is asserted that the native title claim group have continued to hold the native title in accordance with their traditional laws and customs is sufficient to support the assertion.

The requirements of s190B(5)(c) are met.

Conclusion

For the reasons set out above I am satisfied that the factual basis upon which the three assertions contained at s190B(5) are made is sufficient to support the assertions.

The requirements of this section are thus met.

190B6	<p><i>Prima facie case:</i></p> <p><i>The Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the application can be established.</i></p>
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I am satisfied that the application meets this condition and set out my reasoning as follows:-

Reasons for the Decision

In applying this condition I have had specific regard to the Eringa application and the affidavits and heritage studies referred to in relation to s190B(5). I have also had regard to a submission received from the applicants’ representative, Johnston Withers, dated 31 May 1999.

Native title rights and interests are defined at s223 of the Act. The definition specifically attaches rights and interests to land and water and requires that:

- a) the rights and interests be linked to traditional laws and customs;
- b) those claiming the rights and interests have a connection with the relevant land and waters; and
- c) the rights and interests be recognised under the common law of Australia.

The definition is closely aligned with all the issues I have considered in relation to

s190B(5). I will therefore draw on the conclusions made under that section here.

Under s190B(6) I must be consider that, prima facie, at least some of the rights and interests claimed can be established.

The term 'prima facie' was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ who noted:

"The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie" is: "At first sight, on the face of it; as it appears at first sight without investigation." [Citing the Oxford English Dictionary (2nd ed 1989)].

I have adopted the ordinary meaning referred to by their Honours when considering this application.

The native title rights and interests claimed are described at Schedule E of the application. I note that an aspect of this description is the limitation of the claimed native title rights and interests, subject to the valid rights and interests of others. This qualification is significant when considering the prima facie establishment of the claimed native title rights and interests.

I am satisfied that the rights and interests claimed are not inconsistent with the rights and interests granted to others with respect to the area of the application.

Schedule G of the application contains details of activities undertaken by the native title claim group in relation to the application area which also relate to the claimed rights and interests. I note that Schedule G does not include specific instances where members of the native title claim group have carried out these activities. Whilst the information is useful, I do not consider it sufficient evidence for the prima facie establishment of the specific native title rights and interests claimed.

However, further information addressing the prima facie establishment of the claimed native title rights and interests is located in the affidavits, heritage reports and submission, referred to above. It is this information upon which I have relied in deciding which rights and interests can be established.

As I have noted previously, I am satisfied that each of the deponents are members of the native title claim group.

In relation to s190B(4) I noted that the claimed native title rights and interests were particularised under four generic headings.

1.1 Occupation and Economic

1.1.1 the right to access and occupy the claim area, including to live on, camp and erect dwellings on the land

In their affidavits the deponents refer to having undertaken activities in relation to the application area. These activities include residing within the area, camping, hunting and the collection of bush foods, participating in traditional ceremonies and maintaining areas of significance. The deponents also provide details of similar activities carried out by their forbears.

Ruth McKenzie's story, detailed in *Women of the Centre*, also provides evidence of the native title claim group residing on the area and erecting dwellings.

Further, the heritage studies acknowledge the extensive occupation of the area by the forbears of the current members of the native title claim group and that their continuing right of access is derived from "their status as the descendants of the Park's [Witjira] original inhabitants". (*Witjira National Park Management Plan*, p2).

I am satisfied by the information before me that the right can be established prima facie.

1.1.2 the right to take, use, enjoy and develop the natural resources of the claim area

According to the affidavit evidence, the native title claim group has and continues to make use of the natural resources of the area. The use of the area's resources includes the collection and preparation of bush products for food and other uses.

In addition, I note that the *Witjira National Park Management Plan* specifically acknowledges that members of the native title claim group regard "the pursuit of subsistence activities in the Park as essential to the continuation of their cultural traditions and their way of life". This point was also raised in the submission of the applicants' representative.

The *Keeping Culture Strong* report makes reference to archaeological evidence supporting the use of the area's natural resources by the forbears of the current native title claim group including, for example, stone tools and grinding implements.

I am satisfied by the information before me that the right can be established prima facie.

1.1.3 the right to make a living and derive economic benefit from the claim area, including to dispose of the resources or products of the claim area by commerce or exchange

The *Witjira National Park Management Plan* makes specific provision for employment and other economic opportunities, including tourism enterprises, for members of the native title claim group. In their submission, the applicants' representative notes that one of the named applicants is employed as a Ranger in the Park.

Further, the deponents refer to themselves and their forbears having worked on the pastoral stations within the application area. This is supported in the heritage reports, specifically, *One Family, Different Country* and *Keeping Culture Strong*.

I note also that the heritage reports acknowledge the traditional exchange of resources or products between Indigenous peoples in Central Australia. Again I refer specifically to *One Family, Different Country*:

[E]ven culturally diverse peoples, such as those of the Western Desert and Arrernte cultural traditions, would share resources during difficult times and, as importantly, expected to be able to do so. The mechanism which made such 'altruism' possible was 'the willingness of all group members to return to their proper groups areas after temporary absences...in the ordinary course of events, people did seem to travel over huge distances along 'trading routes' and for ceremony.

I am satisfied by the information before me that the right can be established prima facie.

1.1.4 the right to a share of the benefit of resources taken on the claim area by others

I consider the information upon which I relied with respect to the above right and interest to be equally persuasive in relation to this right.

Again, I note the *Witjira National Park Management Plan* makes specific provision for economic opportunities for members of the native title claim group, including, for instance, tourism enterprises.

According to the *Keeping Culture Strong* report, members of the current native title claim group have also been involved in the construction of walking trails within the Park.

Further, the applicants' representative has submitted that the native title claim group "strongly consider their knowledge of the cultural and physical geography of the claim area to be a resource". The provisions contained in the *Witjira National Park Management Plan* pertaining to economic opportunity and consultation support this assertion.

I am satisfied by the information before me that the right can be established prima facie.

1.2 Control and Management

1.2.1 the right to make decisions about the use and enjoyment of the claim area and to manage and conserve the claim area and its natural resources

Each of the deponents refer to having responsibility for the maintenance and protection of areas within the Eringa claim area. The nature of the responsibility is vested in individuals according to their age and position in the claim group, and in accordance with traditional law and custom. The ability to make decisions about the use and enjoyment of the claim area is also an aspect of traditional law and custom.

Contemporary examples of the native title claim group exercising the right to make decisions about the use and enjoyment of the claim area include their joint management of the Witjira National Park (I refer to the *Witjira National Park Management Plan* (draft and final versions), *Keeping Culture Strong* and *Competing Interests*), participation in Work Area Clearances, participation in traditional ceremonies in the application area and the continuing maintenance of the land.

I am satisfied by the information before me that the right can be established prima facie.

1.2.2 the right to control access, occupation, use and enjoyment of the claim area and its resources by others

I am of the view that the information upon which I have relied with respect to the above right and interest to be equally persuasive in relation to this right.

As I have previously noted, the deponents assert that according to traditional laws and customs, access to particular areas/features within the application area and associated knowledge is restricted to certain individuals.

I refer also to a previous quote from *One Family, Different Country*, with respect to the traditional sharing of resources; namely that the sharing of resources was possible on the understanding that it was a temporary arrangement due to environmental hardship.

In addition, members of the native title claim group participate in activities including, for example, Work Area Clearances and the maintenance of the country's features, through which members of the claim group continue to assert their traditional right and responsibility to control the access, occupation, use and enjoyment of the claim area and its resources by others.

I am satisfied by the information before me that the right can be established prima facie.

1.3 Cultural

1.3.1 *the right to speak for, maintain, protect and control access to knowledge of the cultural geography of the claim area, including places of significance under traditional laws, customs and practices in the claim area, (subject, where relevant, to authority shared, pursuant to that traditional law and custom, by elders of neighbouring groups)*

As I have noted above, the deponents each refer to having been passed cultural knowledge about the Eringa application area from their forbears in accordance with traditional law and custom.

Each deposes to having responsibility for that knowledge, including its protection, maintenance and access.

I concur with the submission of applicants' representative. The *Keeping Culture Strong* report acknowledges that members of the native title claim group have participated in the formal recording of the location and significance of particular sites within the Eringa claim area and the design of "interpretive materials for the cultural and physical landscape of Witjira National Park".

I am satisfied by the information before me that the right can be established prima facie.

1.3.2 *the right to maintain, manage, develop, transmit, and prevent the dissemination and misuse of cultural and ritual knowledge relating to the claim area*

I am of the view that the information upon which I have relied with respect to the above right and interest to be equally persuasive in relation to this right.

The deponents expressly state that cultural knowledge pertaining to the application area is passed to individuals in accordance with traditional law and custom. This law and custom mandates that certain knowledge will be accessible to some but not all and the extent of knowledge transmitted relates to one's age and position within the group.

The affidavits provide additional example of the traditional transmission of knowledge:

I am satisfied by the information before me that the right can be established prima facie.

1.3.3 *the right to conduct social, cultural and religious activities (including burials) on the claim area*

The affidavit evidence provides details of the continuing practice of social, cultural and religious activities on the claim area.

The deponents refer, for example, to camping and fishing within the Eringa claim area

with other members of the claim group and participating in traditional ceremonies relating to rites of passage and through which traditional knowledge is transmitted.

I am satisfied by the information before me that the right can be established prima facie.

1.4 Membership

1.4.1 *the right to determine, in accordance with traditional law and custom, the persons to whom native title rights and interests in the claim area are or have been transmitted*

As I have previously noted, the deponents acknowledge that particular cultural information is accessible to certain people only and according to their age and position within the claim group. Further, the deponents state that an aspect of the traditional transmission of knowledge is that those responsible for its transmission have the right to decide who receives the information.

I am satisfied by the information before me that the right can be established prima facie.

Conclusion

Section 190B(6) requires I be satisfied that at least some of the claimed native title rights and interests can be established on a prima facie basis. I am satisfied that each of the listed rights and interests can be established on a prima facie basis.

The requirements of this condition are met.

190B7	<p><i>Traditional physical connection:</i></p> <p><i>The Registrar must be satisfied that at least one member of the native title claim group:</i></p> <p>(a) <i>currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or</i></p> <p>(b) <i>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 land or waters) by:</i></p> <p style="padding-left: 20px;">(i) <i>the Crown in any capacity; or</i></p> <p style="padding-left: 20px;">(ii) <i>a statutory authority of the Crown in any capacity; or</i></p> <p style="padding-left: 20px;">(iii) <i>any holder of a lease over any of the land or waters, or any person acting on behalf of such holder of a lease.</i></p>
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I am satisfied that the application meets this condition and set out my reasoning as follows:-

Reasons for the Decision

The requirements of this section are such that I must be satisfied at least one member

of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

In applying this condition I have had regard to the affidavits and heritage studies referred to in relation to s190B(5) and s190B(6), in addition to information contained in the application itself.

As I have noted previously, I am satisfied that each of the deponents are members of the native title claim group.

I have not quoted from any of the above mentioned documents as I have already done so extensively with respect to the conditions at s190B(5) and s190B(6). I contend that those quotations are as persuasive in respect of this condition.

I therefore summarise as follows:

The affidavits of the deponents satisfy me that they have had and continue to have a traditional physical connection to the claim area. The deponents demonstrate knowledge of the application area and provide details of the exercise of traditional laws and customs. Furthermore, the deponents state that they and other members of the native title claim group continue to visit areas of significance within the claim area where they conduct activities in accordance with traditional laws and customs. These activities include:

- the hunting, collection and preparation of foods using traditional methods;
- sharing of foods in accordance with traditional custom;
- visiting and maintaining places of cultural significance;
- participating in traditional ceremonies; and
- teaching younger members of the claim group about features within the claim area and their spiritual meanings and traditional laws and customs.

The traditional physical connection of the native title claim group is supported by the heritage studies.

I am satisfied that the deponents and other members of the native title claim group have the requisite connection required by this section.

I therefore find that the application meets the condition contained in s190B(7).



190B8	<p><i>No failure to comply with s61A:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that, because of s61A (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.</i></p>
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I am satisfied that the application meets this condition and set out my reasoning as follows:-

Reasons for the Decision

For the reasons that follow I have formed the conclusion that there has been compliance with s61A and that the provisions of this section are met.

s61A(1) – Native Title Determination

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

s61A(2) – Previous Exclusive Possession Acts

Attachment B confirms that the application excludes any areas subject to:

Category A past acts, as defined in s229 of the NTA, including any previous non-exclusive possession acts which are also a Category A past act; and

Grants or vestings which are “previous exclusive possession acts” (as defined in s23B of the NTA) or “Category A intermediate period acts” (as defined in s232B of the NTA) attributable to the Commonwealth and such grants or vestings which are attributable to the State where and to the extent that the State has made provision as mentioned in s23E and s22F of the NTA in relation to these acts.

I am satisfied this exclusion clause meets the requirements of s61A(2).

s61A(3) – Previous Non-Exclusive Possession Acts

As noted above Attachment B to the application provides for the exclusion of “any previous non-exclusive possession acts which are also a Category A past act”.

Further, Schedule E stipulates:

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

- *all existing non-native title rights and interests*
- *all laws in South Australia made in accordance with ss19, 22F, 23E or 23I of the Native Title Act*

I am satisfied that the applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts. The application therefore complies with s61A(3).

s61A(4) – s47, s47A, s47B

The application also states at Attachment A:

The applicants exclude from the area covered by the Application any area over which native title has been extinguished at Common Law or by statute save and except 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 Native Title Act (1993) (NTA).

At Schedule L of the application, the applicants list Witjira National Park, “an area leased to Irranyere Aboriginal Corporation for the benefit of Aboriginal peoples and ... occupied by members of the Eringa native title claim group”. No further details of areas

attracting the benefit of s47, s47A or s47B are provided.

I am required to ascertain whether this is an application that should not have been made because of the provisions of s61A. In my opinion, the applicants' express statements with respect to the provisions of that section are sufficient to meet the requirements of s190B(8). Subsection 61A(4) of the Act provides that an application may be made in these terms. Whether or not the applicants have provided sufficient information to bring any area of land and waters covered by the application within the ambit of s47, s47A and s47B is a matter to be settled in another forum.

The application satisfies this condition of the registration test.

Conclusion

The application complies with s61A. The requirements of s190B(8) are thus met.



190B9 (a)	<p><i>Ownership of minerals, petroleum or gas wholly owned by the Crown:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(a) to the extent that the native title rights and interests claimed consist or include ownership of minerals, petroleum or gas - the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;</i></p>
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I am satisfied that the application meets this condition and set out my reasoning as follows:-

Reasons for Decision

In applying this condition I have relied upon information contained at Schedule Q of the Eringa application.

Schedule Q states:

In this application no claim is being made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by the Crown under valid laws of the Commonwealth or of the State of South Australia.

I am satisfied that this statement adequately addresses the requirements of s190B(9)(a).

The limitation of the claim contained in the application, as set out in Schedule Q, is not contradicted by any information in the map or affidavits accompanying the amended application.

The requirements of this section are met.

190B9 (b)	<p><i>Exclusive possession of an offshore place:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(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;</i></p>
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I have not considered the application against this condition and set out my reasoning as follows:-

Reasons for the Decision

Reference to the map and external boundary description at Schedule B indicates that no claim is being made to an offshore place.

Schedule P of the amended application confirms this analysis.

190B9 (c)	<p><i>Other extinguishment:</i></p> <p><i>The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:</i></p> <p><i>(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)).</i></p>
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I am satisfied that the application meets this condition and set out my reasoning as follows:-

Reasons for the Decision

In applying this condition I have had regard to the amended Eringa application.

This condition requires consideration of whether there are any native title rights and interests claimed by the applicants that have been otherwise extinguished.

At Schedule B, through Attachment B, the applicants specifically provide for the exclusion of “any area over which native title has been extinguished at Common Law or by statute”.

The applicants then provide a general formula for the exclusion of areas where native title rights and interests have been extinguished. In particular, the description at points (1) and (2) of Attachment A effectively excludes from the area of the application all other areas where native title rights and interests have been extinguished. The exclusion clause covers extinguishing acts such as public works and freehold.

The application and accompanying documents do not disclose, and I am not aware of

any additional extinguishment of native title rights and interests in the area claimed.

There is no need for me to consider what may be disclosed in any other material, in particular, tenure information obtained by the Tribunal or provided to it by parties to the application. It appears that even if areas of the type prohibited by s190B(9)(c) are located within the external boundary of the area of the amended application, such areas will be excluded by virtue of Schedule B, Attachment B.

The Commonwealth contended in their submission of 14 January 1999 that the requirements of this section had not been met. I note this submission was made prior to the amendment to the application. Given the nature and extent of the amendments I find this contention is no longer relevant.

I am satisfied that the requirements of this section have been met.