

National Native Title Tribunal
REGISTRATION TEST MINUTE
and
DELEGATE DECISION SUMMARY

TO DELEGATE	Craig Jones
FROM CASE MANAGER	Greg Jervis
DATE	5 February 2000

Application Name	Nauo-Barngarla Native Title Claim		
Name(s) of Applicant(s)	Jody Joseph Miller, Marlene Weetra-Height, Raymond Weetra, Lavinia Heron, Elliott McNamara, Howard Richards, Edith Burgoyne, Leanne Nash		
Region	South Australia, Eyre Peninsular	NNTT No	SC97/8
Date Application Made	18 November 1997	Fed Court No	SG6021/98

Note:

1. *The application was amended in the Federal Court on 12 March 1999 and 1 February 2000.*
2. *The applicants supplied additional information to the Tribunal on 4 May, 6 May and 14 July 1999 and asked that such information be taken into account in applying the test.*

The case manager has considered all the information and documents in the following files, databases and other sources:

- Working Files, Tenure Files, Party Application Files, Registration Test Files, Legal Services Files, Federal Court Applications and Amendment Files for native title applications SC96/4, SC97/6, SC97/8.
- National Native Title Tribunal *Geospatial Database*;
- Register of Native Title Claims;
- Schedule of Native Title Claimant Applications;
- S.190A Register;
- The Native Title Register;
- Native Title Representative Bodies Gazetted Boundaries.

The Case Manager has considered the application against each Registration Test condition contained in s.190B and s.190C of the Native Title Act 1993 and makes the following recommendations:

A. Procedural Conditions

190C2	<i>Information etc required by section 61 and section 62</i>	PASS	
s.61(3)	<i>Names of applicant(s) and address for service</i>	<i>Requirements are met</i>	
s.61(4)	<i>Description of persons in native title claim group</i>	<i>Requirements are met</i>	
s.61(5)	<i>Application in prescribed form, lodged in Federal Court, contains prescribed information and is accompanied by any prescribed documents¹</i>	<i>Requirements are met</i>	
s.62(1)(a)	<i>Affidavit(s)</i>	<i>Requirements are met</i>	

Details required in section 62(2)

62(2)(a)(i)	<i>Information which identifies the boundaries of the area covered by the application</i>	<i>Details provided</i>	
62(2)(a)(ii)	<i>Information which identifies any areas within those boundaries that are <u>not</u> covered</i>	<i>Details provided</i>	
62(2)(b)	<i>A map showing the external boundaries of the area covered by the application</i>	<i>Details provided</i>	
62(2)(c)	<i>Map(s) and textual or other information are consistent in their description of the area</i>	<i>YES</i>	
62(2)(c)	<i><u>IF</u> there is information alerting the CM about searches carried out by the applicant to determine existence of any non-native title interests, are details provided?</i>	<i>Details provided</i>	
62(2)(d)	<i>A description of the native title rights and interests claimed in relation to particular land or waters (and see below)</i>	<i>Details provided</i>	
	<i>Is the description <u>more than</u> a claim to all those native title rights and interests that have not been extinguished at law?</i>	<i>NO</i>	

¹ Note that pre 30.09.98 applications are deemed to have been filed in the Federal Court.
Note that “prescribed information” is that which is required by s.62(2) as set out in the text of this minute document.

62(2)(e)	<i>A general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:</i>
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62(2)(e)(i)	<i>the claim group have, and their predecessors had, an association with the area</i>	<i>Details provided</i>
62(2)(e)(ii)	<i>traditional laws and customs exist that give rise to the claimed native title</i>	<i>Details provided</i>
62(2)(e)(iii)	<i>the claim group has continued to hold native title in accordance with laws and customs</i>	<i>Details provided</i>
62(2)(f)	<i><u>IF</u> there is information alerting the CM that activities are carried on, are details of those activities provided?</i>	<i>Details provided</i>
62(2)(g)	<i><u>IF</u> there is information alerting the CM that the applicant is aware of other applications to the High Court etc, are details provided?</i>	<i>Details provided</i>
62(2)(h)	<i><u>IF</u> there is information alerting the CM that the applicant is aware of any Future Act Notices given pursuant to the amended Act over the area, are details provided?</i>	<i>Details provided</i>

s.62(1)(b)	<i>Details required in s.62(2) above</i>	<i>Requirements are met</i>
s.62(1)(c)	<i>Details of physical connection</i>	<i>Requirements are met</i>

Decision of Delegate (whole of s.190C2)	PASS
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190C3	<i>No previous overlapping native title claim group</i>
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An examination of the *Register of Native Title Claims*, the *s190A Register*, the *Schedule of Native Title Claimant Applications* and the *NNTT Geospatial Database*, shows that no other applications overlap with all or part of this amended application.

Decision of Delegate	PASS	
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Either

190C4(a)	<i>Application has been certified by relevant Representative Body</i>	PASS	
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Or

190C4(b)	<i>Applicants have been authorised by the native title claim group</i>	<i>N/A</i>	
	<i>Statement about authorisation and grounds provided – s.190C(5)</i>	<i>N/A</i>	

An inspection of the Native Title Representative Bodies (NTRB) gazetted boundaries shows that the area of the application is wholly within the Aboriginal Legal Rights Movement (ALRM) gazetted area.

The applicants have provided, as Attachment B to the amended application, a document certifying that, in the opinion of the ALRM, the claim satisfies the requirements of s202(5)(a),(b).

The certifying document from the ALRM contains reasons for certifying the application, and briefly sets out the actions of the ALRM as NTRB in relation to achieving agreement, minimising overlapping applications for determination of native title.

The ALRM certification therefore complies with s202(7)(a)-(c).

The requirements for certification are met

Decision of Delegate	PASS	
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B. Merits Conditions

190B2

Identification of area subject to native title

The application provides in Attachment C, a map produced by the Geospatial Information Unit of the National Native Title Tribunal sourced from AUSLIG, and entitled *Native Title Application SC97/8 Nauo-Barngarla (SG6021/98)*. The map shows the external boundary of the application in a fine blue outline, has coordinates and is dated 05/03/99.

The map meets the requirements of s.62(2)(b).

Schedule B, describes the external boundary of the application, and is consistent with the map provided as Attachment C.

The information provided in Schedule B and Attachment C meet the requirements s.62(2)(a)(i)

Schedule J states that the applicants exclude any area over which native title has been extinguished, except for areas of land or waters over which prior extinguishment may be disregarded in accordance with the provisions of s47, s47A or s47B of the *NTA*. Specifically the applicants exclude any Category A past acts as defined by s229 and any exclusive possession acts as defined by s23B & s23A attributable to the Commonwealth and the State, where the State has made provision as mentioned in s23E & s22F of the *NTA*.

The exclusion of discrete classes of land tenure as outlined, provides sufficient information to allow specific parcels of land to be identified. The information provided meets the requirements of s.62(2)(a)(ii).

The requirements are met.

Decision of Delegate

PASS

190B3

Identification of native title claim group

Schedule A describes the Nauo-Barngarla native title claim group as the descendants and families of a list of named antecedents. For further clarity, the application names the family groups listed as being descended from specific antecedents.

The applicants state that the claim group also includes people who have been adopted by the biological descendants in accordance with traditional laws and customs and who are recognised by the claim group. Two such individuals are named on the application.

While the applicants reserved the right to add further names to the description of the claim group prior to registration testing of the application, no further names have been added.

The application therefore describes the claim group sufficiently clearly so that it can be ascertained whether any person is in that group.

The requirements of this condition are met.

Decision of Delegate

PASS

190B4	<i>Identification of claimed native title</i>
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Schedule E of the amended application contains a description of native title rights and interests as required by s.62(2)(d), sufficient to allow those rights and interests claimed to be readily identified.

These rights and interests are further clarified at Schedule Q, where the applicants state that they do not claim any ownership of minerals, petroleum or gas wholly owned by the Crown under valid laws of the Commonwealth or State.

The requirements are met. Consideration of whether prima facie the claimed native title rights and interests can be made is described in s.190B(6) below.

Decision of Delegate	PASS	
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190B5	<i>Factual basis for claimed native title</i>
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190B(5)(a) – association with the area

Schedules E, F and G of the amended application assert that the claim group have and their predecessors had, an association with the area comprising of the right to use possess and enjoy the area the subject of the claim.

This assertion is supported by additional material supplied by the applicants on 4 May 1999, in which Tindale², Berndt³, Elkin⁴ and Mathews⁵ refer to the Nauo and Barngarla as the coastal people inhabiting the claim area since earliest white settlement.

The applicants assert in Schedule F and G that members of the claim group use and enjoy the area including camping, travelling, hunting, fishing, protecting sites and wildlife, conducting ceremonies and trading artefacts.

At Schedule M the applicants assert that members of the claim group continue their physical traditional connection with the claim area or parts of it, including the activities mentioned above. It is further asserted that claim group member Mr Brenton Weetra and applicant Mr Jody Miller regularly move through the area for a variety of named purposes, and both were taught “..all of those things..” by their elders and father respectively. These assertions are supported by the affidavits of Mr Weetra and Mr Miller.

190B(5)(b) – laws and customs that give rise to the claim to native title rights and interests.

The applicants must show that traditional laws and customs exist, and that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the native title rights and interests.

Schedule E of the amended application asserts that the right to possession, occupation, use and enjoyment derive from and are held in accordance with traditional laws and customs acknowledged and observed by the applicants and the claim group.

² Tindale, N. (1974) *Aboriginal Tribes of Australia*, University of California Press, Berkley, p134-136, 214, 216

³ Berndt, R.M. (1985) Traditional Aborigines, in Twidale, Tyler and Davies (eds) *Natural History of Eyre Peninsula*. Royal Society of SA, pp127-137.

⁴ Elkin, R.H. (1976) *R.H. Mathews; his contribution to Aboriginal Studies (part III)*, Oceania 46(3): 213

⁵ Mathews, R.H. (1900) *Divisions of the South Australian Aborigines*, Proceedings of the American Philosophical Society 39: 78-90.

These assertions are further supported by the affidavits of Mr Miller, Mr Weetra and Ms Buzza which details aspects of the traditional laws and customs observed by the native title claim group.

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

To satisfy this criterion, the native title claim group must continue to hold native in accordance with their traditional laws and customs. The reasons set out in 190B(5)(a)-(b) above, and the aforesaid affidavit material, provide the factual basis supporting this.

On the basis of this material the requirements of s190B(5)(a)-(c) have been met.

Decision of Delegate	PASS	
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190B6 Prima facie case

The applicants have submitted the following information for consideration:

1. Berndt, R.M. (1985) Traditional Aborigines, in Twidale, Tyler and Davies (eds) *Natural History of Eyre Peninsula*. Royal Society of SA, pp127-128.
2. Elkin, R.H. (1976) *R.H. Mathews; his contribution to Aboriginal Studies (part III)*, Oceania 46(3): 206-234.
3. Mathews, R.H. (1900) *Divisions of the South Australian Aborigines*, Proceedings of the American Philosophical Society 39: 78-90.
4. Schurmann, E.A. (1987) *I'd Rather Dig Potatoes, Clamor Schurmann and the Aborigines of South Australia 1838-1853*. Lutheran Publishing House, Adelaide.
5. Tindale, N. (1939) *Field Notebook (Volume 2)* Harvard-Adelaide Universities Anthropological Expedition. SA Museum, Adelaide.
6. Tindale, N. (1974) *Aboriginal Tribes of Australia*, University of California Press, Berkley.
7. *Affidavit of Applicant Mr Jody Miller (JM)*, sworn on 30 April 1999.
8. *Affidavit of Mr Brenton Weetra (BM)*, sworn 5 May 1999.
9. *Affidavit of Ms Cythia Weetra Buzza (CB)*, sworn 28 April 1999

Specifically, in respect of each of the rights and interest asserted, the applicants have submitted the evidence cross-referenced below.

(a) The right to possess, occupy, use and enjoy the

- 1 127, 128.
- 2 213, 216, 219, 220, 222.
- 3 79, 90.
- 4 251, 252.
- 5 1041, 1045.
- 6 66, 214.
- JM 4, 14, 15, 16.
- BW 7, 8, 9, 10, 11, 12, 13, 14, 17.
- CB 7, 12.

(b) the right to make decisions about the use and enjoyment of the area;

- JM 10, 11, 12, 13.
- BW 13, 14, 15.

(c) the right of access to the area;

2 216,219.

JM 7.

BW 7, 8, 13, 14, 15.

CB 13.

(d) the right to control the access of others to the area;

6 66.

JM 10, 11, 12, 13.

BW 13, 14, 15.

CB 16.

(e) the right to enjoy resources of the area;

2 216, 219.

5 1041.

JM 8, 9.

BW 7, 8, 9, 10, 11, 12.

CB 13.

(f) the right to control the use and enjoyment of others of resources of the area;

JM 10, 11, 12, 13.

BW 13, 14, 15.

(g) the right to trade in resources of the area;

BW 18

(h) the right to receive a portion of any of the resources taken by other from the area;

BW 15, 16, 18, 19.

(i) the right to maintain and protect places of importance under traditional laws, customs and practices in the area; and

6 66

JM 3, 4, 6, 10, 11, 14.

BW 13, 14, 19, 20.

(j) the right to maintain, protect and prevent the misuse of cultural knowledge of the common law holders associated with the area.

JM 11, 15.

BW 5, 9, 13, 14, 19, 20.

CB 12.

These affidavits and supporting documents provide sufficient material and information to establish on a prima facie basis that each of the native title rights and interests claimed at Schedule E of the application, can be established.

Decision of Delegate	PASS	
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190B7	<i>Physical connection</i>
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At Schedule M the applicants assert that members of the Native Title Claim Group, continue their traditional physical connection with the land and waters of the claim area by residing, camping, travelling, hunting, gathering, fishing, protecting and maintaining sites and wildlife, conducting ceremonies and by trading in or the giving of resources from the area.

In the additional material supplied on 4 May 1999, it is asserted that Mr Miller and Mr Weetra regularly move about the area, fish in the waters, hunt, gather and camp in the Parks and Reserves in the area and seek to protect sites within the area. It is further asserted they was shown and taught these things by their father and elders respectively. These assertions are further supported by the affidavits of Mr Miller and Mr Weetra.

The requirements are met.

Decision of Delegate	PASS	
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190B8	<i>No failure to comply with section 61A</i>
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62A(1)	<i>Approved determination of native title</i>		<i>No</i>
61A(2)	<i>A previous exclusive possession act has been done in relation to the area</i>		<i>No</i>
61A(3)	<i>A previous non-exclusive possession act has been done in relation to the area <u>and</u> a right of exclusive possession has been claimed</i>		<i>No</i>
61A(4)	<i>The application states that section 47, 47A or 47B applies to it</i>	<i>Yes</i>	

Decision of Delegate	PASS	
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190B9(a)	<i>Native title rights and interests claimed do not include ownership of minerals, petroleum or gas wholly owned by the Crown</i>
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Schedule Q of the amended application states that no claim is for ownership of minerals, petroleum or gas wholly owned by the Crown under valid laws of the Commonwealth or State of South Australia.

The requirements are met.

Decision of Delegate	PASS	
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190B9(b)	<i>No claim to exclusive possession of waters in an offshore place</i>
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Schedule B and Attachment C show that the external boundary of the application follows the coastline from the Coffin Bay National Park to Elliston at about 5-10 nautical miles.

Section 253 of the *Native Title Act* defines water as including the shore between high water and low water, and offshore as meaning any land or waters other than onshore (defined as within the limits of a State or Territory). By reference to the *Straight Baselines and Some bay-Closing Lines Constituting Part of the Inner Limit of Australia's Territorial Sea in the Vicinity of South Australia* (NATMAP) it can be ascertained that while a portion of the coastline can be deemed to be onshore as a result of being within South Australia's Territorial jurisdiction, the majority of the waters are not within SA's territorial limits and as such can be considered to be offshore.

However, while this portion of coastline can be deemed to be offshore waters, the applicants have made no claim to exclusive possession of any area within the external boundary of the application, including offshore areas. At Schedule P the applicants state that the native title rights and interests claimed do not purport to exclude all other rights in relation to the whole or part of the offshore area.

The requirements are met.

Decision of Delegate	PASS	
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190B9(c)	<i>No other extinguishment (except that to be disregarded under s.47, s.47A or s.47B)</i>
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At Schedule J the applicants state that they exclude any area over which native title has been extinguished, including by valid acts of adverse dominion, except for areas of land or waters over which prior extinguishment may be disregarded in accordance with the provisions of s47, s47A or s47B of the NTA. Specifically the applicants exclude any Category A past acts as defined by s229 and any exclusive possession acts as defined by s23B & s23A attributable to the Commonwealth and the State, where the State has made provision as mentioned in s23E & s22F of the NTA.

At Schedule P the applicants also state that the native title rights and interests claimed do not purport to exclude all other rights in relation to the whole or part of the offshore area.

These statements, read in conjunction, establish that the applicants do not intend to claim rights and interests over areas where those rights and interests have been validly extinguished. See more detailed reasoning under s.190B(2) and s.190B(8).

As such, neither the application nor any accompanying documents or submissions disclose anything which would indicate that the native title rights and interests claimed have otherwise been extinguished.

Further, a search of the Register of Indigenous Land Use Agreements on 21 December 1999, shows no evidence that the native title rights and interests claimed have been extinguished, pursuant to any agreement made between the native title claim group and any other party.

The requirements are met.

Decision of Delegate	PASS	
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