

National Native Title Tribunal

REGISTRATION TEST MINUTE
And
DELEGATE DECISION SUMMARY

TO DELEGATE	Simon Nish
FROM CASE MANAGER	Monica Khouri
DATE	2 November 1999

Application Name	The Arabunna People's Native Title Claim		
Name(s) of Applicant(s)	Reginald Dodd, Millie Warren and Laurie Stuart		
Region	SA	NNTT No	SC98/2
Date Application Made	16 th January 1998	Fed Court No	SG6025/98

The Delegate 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 decision:

Brief History of the application

The original application was lodged with the Adelaide Registry of the National Native Title Tribunal on 16th January 1998. Leave to amend the application was granted by the Federal Court on 7th September 1999. The amendments to the application included the following:

- Application SG6025 of 1998 be amended in terms of the Amended Form 1 application, including the annexures thereto as filed with the Court on the 27th day of August 1999 in substitution for the original Form 1 application received by the Adelaide Registry of the National Native Title Tribunal on the 22nd day of January 1998.
- Application SG6025/98 shall hereafter be referred to as “The Arabunna People’s Native Title Claim”

Leave was also granted to the applicants to submit, at a later date, a new map of the area that is the subject of the application together with a list of co-ordinates to the boundaries.

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:

- ◆ Working files SC95/2, SC95/4, SC95/7, SC96/4, SC99/1 & SC99/2;
- ◆ The National Native Title Tribunal Geospatial Database;
- ◆ The Register of Native Title Claims;
- ◆ The Native Title Register;

Date	Brief description of document
8/3/99	Internal e-mail concerning Injunction proceeding in the Federal Court
8/3/99	E-mail from NNTT Legal Officer concerning Injunction proceedings
6/5/99	Amended Certification document from ALRM
27/8/99	Amended Form 1 filed with the Federal Court: Certification document from the ALRM marked “Attachment R”.
7/9/99	Order of the Federal Court
September 99	Material lodged with the Tribunal by Camatta Lempens: providing further information, being: <ul style="list-style-type: none">• Signed sworn Affidavit from [name deleted], dated 27/8/99• Signed sworn Affidavit from [name deleted], dated 16/8/99• Signed sworn Affidavit from [name deleted], dated 4/6/99
28/9/99	Filenote from Case Manager to legal section (NNTT): clarification concerning Affidavit material submitted.
29/9/99	Letter from Camatta Lempens: confirmation that delegate can

	consider Affidavit material.
30/9/99	Further amended Certification document from ALRM
14/10/99	Letter from Camatta Lempens: providing further clarification of description of external boundary
22/10/99	Filenote from Case Manager: ALRM Certification
28/8/98	Ramsar Management Plan, Aboriginal Issues Paper (Draft Report). (Culture and Heritage).
Autumn 1997	Excerpt from <i>Community Aid Abroad, SA Newsletter</i> : "The Lake, The Desert & The Dreaming: A visit to Lake Eyre hosted by the Arabunna community"
1993	Davis, Stephen L. (unpublished report): "Traditional Interests in Lake Eyre South Region of South Australia"
1921	Basedow, Herbert. (1921): "Third Medical relief Expedition among the Aborigines of South Australia"

A. Procedural Conditions

190C2	<i>Information etc required by section 61 and section 62</i>	PASS
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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>
	<i>Map(s) and textual or other information are consistent in their description of the area</i>	<i>YES</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)(c)	<i>IF 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>	YES

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>IF 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>IF 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>IF 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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Having considered Schedules A and O of the application and Attachment A, I am satisfied that there are no common applicants with any of the overlapping applications which are set out at Schedule H.

Decision of Delegate

PASS

190C4(a)

Application has been certified by relevant Representative Body

PASS

The application has been certified by the relevant representative Aboriginal/Torres Strait Islander body. I note that the certificate has been signed by Sydney Sparrow, Director, Aboriginal Legal Rights Movement, who would have the proper authority to sign such a document. I am satisfied that the certification fulfils the requirements of s.190C(4) of the Act.

In reaching that decision I have also had regard to the matters raised by [name deleted] in the Federal Court proceedings of the 8th March 1999.

Decision of Delegate

PASS

B. Merits Conditions

190B2

Identification of area subject to native title

Reasons for the Decision

Map and External Boundaries

The application at Attachment “**Map Schedule C**” provides a map depicting the external boundaries of the claim area which has a locality diagram and clearly marked grid references.

I am satisfied that the map submitted with the application meets the requirements of s62 (2)(b) as the boundaries of the areas covered by the application can be identified.

Written description

In addition to the provision of a map defining the external boundaries of the claim, the applicants at Schedule B have provided a detailed written description of the external boundary, and have further provided a list of

coordinates of 518 points defining the external boundary.

There are some minor technical discrepancies between the map and written description provided with the amended application. The applicants provided the Tribunal a further map and written description on 14th October, which have been prepared by the Tribunal's Geospatial Unit, and which I am satisfied address the minor discrepancies in the amended application. I am further satisfied that the additional information provided by the applicants is purely to clarify the material lodged with the Federal Court and in no way amends the amended application. **I note the applicants state their intention to lodge this further information with the Federal Court at a future date, for completeness sake.**

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

Internal Boundaries

At Schedule B the application specifically excludes any land covered by the pastoral lease known as Todmorden Station, and also the land known as the Oodnadatta Common (a map of the specific lots within the Oodnadatta Common is provided at Attachment B1).

At Attachment B, the applicants have provided information identifying the internal boundaries of the claimed area by way of a formula that excludes a variety of tenure classes from the claim area, being all areas within the claim area, excluding:

- Category A past acts, as defined by s. 229 of the Native Title Act 1993
- Previous exclusive possession acts, as defined by s.23B of the Native Title Act 1993
- Areas over which native title has been extinguished by common law or statute, **save** for those areas over which prior extinguishment may be disregarded in accordance with the provisions of either s. 47, 47A or 47B of the Native Title Act 1993. (Note: see Attachment B(1) for a full description of the exclusions).

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 of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicant. I consider that the description provides a reasonable level of certainty.

I note that the applicant makes exceptions to the particular exclusions cited in the application by claiming the benefit of s47, s47A and s47 of the *Act* as they apply to any part of the area contained within the application. At Schedule L the applicant does not identify specific "parcels" of land where any of s47, s47A or s47B apply, but rather, relies on reference to class tenures. Consistent with the reasoning set out above in respect of

identifying areas excluded from the claim, I am of the view that identifying the areas so excepted from the exclusions in the manner done by the applicant does allow specific geographic location subject to tenure research.

Decision of Delegate

PASS

190B3

Identification of native title claim group

Reasons for the Decision

To meet this condition of the registration test the description of the group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

Schedule A defines the claim group as comprising:

- Named apical ancestors (with profiles provided in Attachment A to assist in identification), and
- Their biological descendants.

Attachment A also qualifies the definition of the claim group by excluding certain persons from the claim group. Schedule O further qualifies the native title claim group by clarifying who is excluded from it.

It appears from Schedule A that descent is the principle means of recruitment under the Arabunna traditional laws and customs into the native title claim group.

In my view the description of the claim group is sufficiently precise so that it can be ascertained whether any particular person is a member of the native title claim group.

Decision of Delegate

PASS

190B4

Identification of claimed native title

Reasons for the Decision

Schedule E of application particularises sixteen native title rights and interests claimed by the applicants.

I note that the applicants are not claiming exclusive possession.

These rights and interests are subject to all valid non-native title rights and interests, and laws of South Australia made in accordance with sections 19, 22F, 23F, 23E or 123 of the Native Title Act 1993

At Schedule Q the rights and interests claimed are further qualified: no claim is being made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas owned by the Crown under valid laws of the Commonwealth or State.

Decision of Delegate

PASS

190B5

<i>Factual basis for claimed native title</i>

Reasons for the Decision

There are three criteria to consider in determining over all whether or not I am satisfied that there is a sufficient factual basis to support the applicants' assertion about the existence of the native title rights and interests listed at Schedule E of this application.

(a) An association with the area;

To be satisfied under this criterion, it must be evident that the association with the area is shared by a number of members of the native title claim group and was shared by their predecessors.

In considering this condition, I have had regard to Schedule F and the affidavits of **[name deleted]**, three members of the native title claim group. On the basis of their affidavits it is clear that these people have an association with the claim area and are descended from people who also had an association with the claim area:

- **[name deleted]**, Warren, paras 2-16,
- **[name deleted]**, Dodd, paras 2-17,
- **[name deleted]**, Stuart, paras 2, 3, 5, 7-27.

190B(5)(b) – that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests.

This subsection requires me to be satisfied that traditional laws and customs exist; 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 claim to native title rights and interests.

I have had regard to Schedules F and G of the amended application and the affidavits of **[name deleted]**, Warren, Dodd and Stuart, three members of the native title claim group. On the basis of the affidavits provided it is clear that there exist traditional laws and customs observed by the native title claim group that give rise to the claim to native title rights and interests. The laws and customs include rights to access, utilising and trading the resources of Arabunna land, preserving culture, including stories and language, learning and passing on knowledge of Arabunna country and exercising responsibility for Arabunna country. See:

- **[name deleted]**, paras 3, 6, 9-16,
- **[name deleted]**, paras 3-17,
- **[name deleted]**, paras 3-5, 7-27.

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

Under this criterion, I must be satisfied that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

For the reasons set out in 190B(5)(b) and having regard to the same affidavit material I am satisfied that there is a factual basis for the claim group continuing to hold native title in accordance with those traditional laws and customs.

Decision of Delegate

PASS

190B6

<i>Prima facie case</i>

Reasons for the Decision

In considering this condition I have had regard to Schedule G and the affidavits of **[name deleted]**, three members of the native title claim group

Those affidavits provide sufficient material and information to satisfy me on a prima facie basis that each of the native title rights and interests claimed by the applicants at Schedule E of the application can be established.

The 3 deponents of the affidavits have provided me with specific evidence addressing each of those rights and interests, as follows:

1. *Right to possess, occupy, use and enjoy the area;*

The affidavits provide evidence of the members of the native title claim group asserting these rights, some of which is detailed below.

- [name deleted], paras 2-16,
- [name deleted], paras 2-17,
- [name deleted], paras 2-5, 8-11, 13-27.

2. *Right to make decisions about the use and enjoyment of the area;*

The affidavits provide evidence of the members of the native title claim group asserting these rights, some of which is detailed below.

- [name deleted], paras 14-16,
- [name deleted], paras 8, 9, 12, 16,
- [name deleted], paras 20.

3. *Right of access to the area;*

The affidavits provide evidence of the members of the native title claim group asserting these rights, some of which is detailed below.

- [name deleted], paras 2-16,
- [name deleted], paras 2-17,
- [name deleted], paras 2-5, 8-11, 13-27.

4. *Right to control the access of others to the area;*

The affidavits provide evidence of the members of the native title claim group asserting these rights, some of which is detailed below.

- [name deleted], paras 14-16,
- [name deleted], paras 8, 9, 16,
- [name deleted], paras 14,15.

5. *Right to use and enjoy the resources of the area;*

The affidavits provide evidence of a member of the native title claim group exercising this right:

- [name deleted], paras 9, 11, 12,
- [name deleted], paras 8, 10,
- [name deleted], paras 16, 27.

6. *Right to control the use and enjoyment of others of resources of the area;*

The affidavits provide evidence of members of the native title claim group asserting these rights, some of which is detailed below.

- [name deleted], paras 14,
- [name deleted], paras 8, 9, 16.

7. *Right to trade in resources of the area;*
The affidavits provide evidence of a member of the native title claim group exercising this right:
- **[name deleted]**, paras 16.
8. *Right to receive a proportion of any resources taken by others from the area;*
The affidavits provide evidence of members of the native title claim group asserting these rights, some of which is detailed below.
- **[name deleted]**, paras 16.
9. *Right to maintain and protect places of importance under traditional laws, customs and practices in the area;*
The affidavits provide evidence of members of the native title claim group exercising this right:
- **[name deleted]**, paras 14,
 - **[name deleted]**, paras 8, 9, 13, 14,
 - **[name deleted]**, paras 14, 15, 17- 19, 27.
10. *Right to carry out and maintain burials of deceased members of the claim group within the area;*
The affidavits provide evidence of members of the native title claim group exercising this right:
- **[name deleted]**, paras 13,
 - **[name deleted]**, paras 18, 27.
11. *Right to control, maintain, protect and prevent the dissemination and misuse of cultural knowledge associated with the area;*
The affidavits provide evidence of members of the native title claim group exercising this right:
- **[name deleted]**, paras 3, 5, 6, 8-16,
 - **[name deleted]**, paras 3-6, 8-17,
 - **[name deleted]**, paras 3-5, 7-27.
12. *Right to inherit and bestow native title rights and interests.*
The affidavits provide evidence of members of the native title claim group exercising this right: **this is repeated in schedule E, point 17.**
- **[name deleted]**, paras 3, 6, 8, 10-12, 14-16,
 - **[name deleted]**, paras 4-6, 8, 11,
 - **[name deleted]**, paras 3, 5, 10, 15, 17, 20, 22, 25, 26.
13. *Right to conduct ceremonies on the area*
The affidavits provide evidence of members of the native title

claim group exercising this right:

- [name deleted], paras 10,
- [name deleted], paras 15,
- [name deleted], paras 10, 11, 15, 21, 23.

14. Right to control the conduct of ceremonies of others on the land

The affidavits provide evidence of the members of the native title claim group asserting these rights, some of which is detailed below.

- [name deleted], paras 15,
- [name deleted], paras 15.

15. Right to hold, assert and exercise responsibility for the welfare of the country in the area

The affidavits provide evidence of members of the native title claim group exercising this right:

- [name deleted], paras 10, 14.
- [name deleted], paras 8 – 17.
- [name deleted], paras 14 - 19.

16. Right to resolve amongst the claimant group any disputes between themselves about land tenure

The affidavits provide evidence of the members of the native title claim group asserting these rights, some of which is detailed below.

- [name deleted], paras 15,
- [name deleted], paras 20,24,25.

Decision of Delegate

PASS

190B7

<i>Physical connection</i>

Reasons for the Decision

Under s 190B(7)(a) I must be satisfied that 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.

Schedule M and Attachment M of the amended application and the affidavit material provided by the applicants satisfies me that a number of members of the native title claim group currently have and have had traditional physical connection to parts of the claim area. I refer specifically to :

- [name deleted], paras 2, 4, 5, 7-10, 12, 14, 15,
- [name deleted], paras 2-10, 13, 14, 17,
- [name deleted], paras 2, 4, 5, 10, 11, 13, 14, 16-19, 21, 23-25.

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>No</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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Reasons for the Decision

At Schedule E of the application the applicants have asserted a right to natural resources – including the right to use and enjoy the resources of the area and the right to control the use and enjoyment of others of resources of the area.

However, at Schedule Q of the application, the applicants state 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 and under the valid laws of the Commonwealth or State.

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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Reasons for the Decision

The area claimed does not include any offshore area. It is therefore not necessary for me to consider this section further as it is not relevant.

Decision of Delegate	<i>PASS</i>
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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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Reasons for the Decision

The application and accompanying documents do not disclose, nor am I otherwise aware, that the application contravenes the criteria set out in s.190B(9)(c).

Decision of Delegate	<i>PASS</i>
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Decision of Delegate

1. The application IS ACCEPTED for registration pursuant to s.190A of the *Native Title Act 1993*

If the claim is not accepted for registration, written notice of the decision and the reasons for the decision, are to be provided to the applicant and to the Federal Court, in accordance with s.190D of the *Native Title Act*.

The Registrar is to give notice of the decision, as required by s.66(3) of the *Native Title Act*, whether or not the claim has been accepted for registration.

DELEGATE

DATE