National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

Delegate: Graham Miner

Application Name: Eringa #2

Names of Applicants: Mrs Edie King, Mrs Ruth McKenzie, Mrs Emily Churchill, Mr Howard Doolan, Mr Dean Ah Chee, (Name withheld for cultural reasons), Ms Marilyn Hull

Region:	South Australia	NNTT No:	SC99/4
Date Application Made:	26 May 1999	Federal Court No:	SG6002/99

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

DECISION

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

Graham Miner

21 May 2003
Date of Decision

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

Brief History of the Application

On 26 May 1999, the application was filed in the South Australian District Registry of the Federal Court of Australia ('the Court'). At a Directions Hearing 27 May 1999, the Court ordered that the Registrar reject the application for the time being and that the documents be retained by the Court pending the further order of the Court. On 7 September 2001, the Court ordered that the application "be referred to the National Native Title Tribunal for Determination with regard to the Registration Test". The order was entered 13 September 2001. Amendments to the application were filed on 25 July 2002 and considered by the Federal Court on 26 July 2002. Pursuant to the orders made by the Court a re-engrossed application was filed 29 July 2002 and a copy of the application was also provided to the National Native Title Tribunal, SA Registry.

The applicants named in the application are Mrs Edie King, Mrs Ruth McKenzie, Mrs Emily Churchill, Mr Howard Doolan, Mr Dean Ah Chee, (Name withheld for cultural reasons) and Ms Marilyn Hull.

The western boundary of the SG6002/99 Eringa #2 application, the subject of this registration test, is coincident to the eastern boundary of the SG6010/98 Eringa #1 application.

Unless otherwise indicated, references to 'the application' throughout these Reasons for Decision refer to the latest amended version of the SG6002/99 Eringa #2 application.

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

On 12 November 2002, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal, including myself, all of the powers given to the Registrar under sections 190, 190A, 190B, 190C, 190D of the Native Title Act 1993 (C'wlth).

The delegation of 12 November 2002 has not been revoked as at this date.

Information considered in making the decision

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

- Federal Court Application filed 26 May 1999;
- Federal Court Amended Application filed 29 July 2002;
- The Registration Test File;
- Determination of Native Title Representative Bodies; their gazetted boundaries;
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- The National Native Title Register;
- ILUA Database;
- Correspondence from the applicants' representative dated 22 and 28 July 2002, 9 August 2002, 31 October 2002, 12 and 19 November 2002 (by E-Mail), 5 December 2002, 19 December 2002 (by E-Mail), 9 January 2003, 14 March 2003, 1 April 2003 and 4 April 2003 (by E-Mail);

- Correspondence to the applicants' representative dated 15 October 2001, 12 November 2002, 2, 7 and 13 January 2003;
- Correspondence from Ms Georgina Reid (former legal representative for the applicants) dated 14 November 2002;
- Correspondence from the Aboriginal Legal Rights Movement (NTRB) dated 15 August 2002;
- Correspondence from the Crown Solicitor's Office dated 6 August 2002, 4 September 2002, 19 November 2002, 18 and 24 December 2002, 10 January 2003 and 26 March 2003.
- Affidavits sworn by members of the Native title claim group referred to in the reasons for decision.
- Lease dated 5 October 1995 between the Minister for the Environment and Natural Resources (Lessor) and the Irrwanyerre Aboriginal Corporation (Lessee).
- Management Plan for Witjira National Park, a Heritage Survey of Witjira National Park called "Keeping Culture Strong", a paper on Aboriginal Participation in National Parks called "Competing Interests", of which Susan Woenne-Green was one of the authors, excerpts from a publication by Kim Doohan entitled "One Family, Different Country", excerpts from a book edited by Adele Pring entitled "Women of the Centre", and two anthropologist's reports prepared for the applicants' legal representative by Susan Woenne-Green dated 5 December 2002 and 13 March 2003.
- Other information referred to in the reasons for decision.

A. Procedural Conditions

s.190C(2)

Information, etc., required by section 61 and section 62:

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 refer to the individual reasons for decision in relation to sections 61 and 62 set out below. I find that the procedural requirements of sections 61 and 62 have been met and accordingly I find that the application meets the requirements of s.190C(2).

Details required in section 61

S.61(1). The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

Reasons relating to this sub-condition

Attachment A of the application provides a description of the native title claim group which is said to comprise those people (now alive) who are the biological descendants of named apical ancestors or certain named individuals related by traditional principals of descent to named apical ancestors, and other named individuals and their biological descendants. Attachment A further describes the principles of incorporation into the Eringa native title claim group according to traditional law and custom.

I do not have any other information that indicates that this group does not include, or may not include, all the persons who hold communal native title in the area of the application.

Result: Requirements met

s.61(3) Name and address for service of applicants

Reasons relating to this sub-condition

Part B of the application sets out the applicants' address for service.

Result: Requirements met

s.61(4) Names the persons in the native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons

Reasons relating to this sub-condition

An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of section 61(4)(a) are not met.

For the reasons set out in relation to section 190B(3)(b) I find that the persons in the native title claim group are described sufficiently clearly in Attachment A, so that it can be ascertained whether any particular person is one of those persons in accordance with section 61(4)(b).

Result: Requirements met

s.61(5) Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents

The application meets the requirements of s.61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a), Native Title (Federal Court) Regulations 1998.

As required by s.61(5)(b), the application was filed in the Federal Court on 26 May 1999.

The application is accompanied by affidavits sworn by each of the applicants as prescribed by s.62(1)(a) and by a map as prescribed by s.62(2)(b).

I refer to my reasons for decision in relation to those sections of the Act.

Result: Requirements met

Details required in section 62(1)

s.62(1)(a) Affidavits address matters required by s.62(1)(a)(i) – s.62(1)(a)(v)

Reasons relating to this sub-condition

The original application filed in the Federal Court was accompanied by seven affidavits sworn by the named applicants. In their affidavits the applicants are identified by name and address. The affidavits were sworn before Ms Georgina Reid, Solicitor, at Coober Pedy on 24 May 1999. The affidavits of **[name deleted]** and **[name deleted]** are signed by their affixing their mark in the form of an "X". On 14 November 2002, Ms Reid confirmed the following by way of email to the Tribunal:

> "I have received an email from Richard Bradshaw in relation to Affidavits sworn by **[name deleted]** and **[name deleted]** in Coober Pedy on 24 May 1999. I recall the swearing of each of these Affidavits and confirm that each of the above named duly swore their affidavits before me. I also confirm that, to the best of my knowledge and belief, each gave her informed consent to the matters contained in the affidavit. The swearing of the Affidavits followed a lengthy meeting of the Native Title Management Committee at which meeting the contents of the Application and the Affidavit were gone through in detail."

The Rules of the Federal Court provide that where a deponent is illiterate, the person before whom the affidavit is sworn shall certify that:

(a) the affidavit was read in their presence to the deponent; and
(b) the deponent seemed to understand the affidavit (Order 14 rule 2(3)).

Where it appears to the person before whom an affidavit is sworn that the deponent is by reason of *physical incapacity* incapable of signing the affidavit that person shall certify that –

(c) the affidavit was read in their presence to the deponent; and
(d) the deponent seemed to understand the affidavit; and
(e) the deponent signified he or she swore the affidavit (Order 14 rule 2(4)).

Where an affidavit is made by an illiterate or blind deponent and a certificate in accordance with sub rule (3) does not appear on the affidavit, the affidavit may not be used *unless* the Court is satisfied that the affidavit was read to the deponent and they seemed to understand it (Order 14 rule 2(5)).

An affidavit may however be filed notwithstanding any irregularity in form and may, with the leave of the court, be used notwithstanding any irregularity of form (Order 14 rule 5 (1) & (2)).

Further, where an Act prescribes a form, then (unless a contrary intention appears) strict compliance with the form is not required and substantial compliance is sufficient (s25C Acts Interpretation Act 1901 (Cth)).

Based on Ms Reid's statement, I am satisfied that the above deponents understood the contents of the affidavit and signed by making their mark. In arriving at this conclusion I have also had regard to the fact the Court accepted the affidavits and that there has been no challenge to the deponents having sworn the affidavits. I consequently accept the affidavits for the purpose of this administrative test notwithstanding their defects as to form.

In their affidavits the applicants depose in paragraphs (a) to (d) to the matters contained in s.62(1)(a) (i)-(iv) essentially using the words of the statute, and the requirements of these sub-paragraphs are therefore satisfied.

Section 62(1)(a)(v) requires that the affidavits state the basis on which the applicants are authorised as mentioned in subparagraph (iv). Section 251B defines the processes that may be followed for applicants to be authorised by all the persons in the native title claim group. Essentially, authorisation may be effected:
(a) in accordance with a process of decision making under traditional laws and customs, or, where there is no such process,
(b) in accordance with a process of decision-making agreed to and adopted by the persons in the native title claim group.

The applicants depose in paragraph (e) of their affidavits that they are authorised by virtue of resolutions passed by the native title claim group on 16-19 April 1999, and that a true copy of the resolutions is provided as Attachment T1 to the application. The affidavits refer in particular to resolutions 1 and 3(v) that relate to authorisation of the applicants, and the role of the Management Committee in respect of lodging any further claim it considers necessary (in addition to the SG6010/98 Eringa # 1 application) to

ensure that the whole of the claim area is covered. The Management Committee is comprised of certain named individuals and all of the named applicants.

At paragraph (f) of their affidavits, the applicants depose that they are further authorised by virtue of resolutions passed by the Native Title Management Committee on 22 May 1999, and that a true copy of the resolutions is provided as Attachment T2 to the application.

I am satisfied that the requirement of s. 62(1)(a)(v) is satisfied.

I add that the certification report provided to the Tribunal on or about 20 August 2002 by the representative Aboriginal and Torres Strait Islander Body (ALRM), includes statements regarding authorisation and the current application and refers to the same meetings that the applicants refer to in their affidavits. The certification states that the ALRM is satisfied that the applicants were authorised at those meetings to make the application and deal with all matters arising in relation to it on behalf of all other persons in the claim group.

A further statement has been provided in Part A of the application under Authorisation. The application states:

> "The applicants have authority to make this application on behalf of all persons in the native title claim group by virtue of resolutions passed at a meeting of the native title claim group held at Finke on 16-19 April 1999, and by further resolutions passed at a meeting of the Eringa Native Title Management Committee held at Coober Pedy on 22-23 May 1999, which meetings were convened by the Aboriginal Legal Rights Movement Inc., the native title representative body for the area covered by the application, for the purpose of fulfilling its functions under s.202(4)(d) of the *Native Title Act."*

I am of the view that the amended application does not have to be accompanied by further s. 62(1)(a) affidavits. I rely on the decision of the Federal Court in *Drury & Ors v Western Australia (2002) 97 FCR 169*. Briefly, French J found that there is no express requirement for applicants seeking to amend their native title application to file fresh affidavits each time their application is amended. As the amendment does not result in any new applicant to that identified in the original application I am of the view that the affidavits accompanying that application may be relied on for the amended application.

I am satisfied that the requirements of s. 62(1)(a) are satisfied.

Result: Requirements met

S.62(1)(c) Details of traditional physical connection (information not mandatory)

Comment on details provided

Schedule G provides details of activities currently being carried out in the application area and Schedule M provides details of traditional physical connection covered by the application.

Further details are provided in the form of affidavit material submitted directly to the Tribunal on behalf of members of the native title claim group.

Result: Provided

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

S.62(2)(a)(i) Information identifying the boundaries of the area covered

Reasons relating to this sub-condition

Schedules B and C provide details of the area claimed and they also refer to a map, which is provided as Attachment C to the application.

For the reasons which lead to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information provided by the applicants in Schedules B and C enable the boundaries of the area to be identified with reasonable certainty and meets the procedural requirements of s.62(2)(a)(i).

Result: Requirements met

s.62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered by the application

For the reasons which lead to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information provided by the applicants in Attachment B is sufficient to enable the area not covered by the application to be identified with reasonable certainty and meets the procedural requirements of s.62(2)(a)(ii).

Result: Requirements met

s.62(2)(b) A map showing the external boundaries of the area covered by the application

Reasons relating to this sub-condition

Schedules B and C refer to a map, which is provided as Attachment C to the application. The map clearly identifies the external boundaries of the area covered by the application.

Result: Requirements met

s.62(2)(c) Details/results of searches carried out by the applicant to determine the existence of any non-native title rights and interests

Reasons relating to this sub-condition

Schedule D of the application states:

"Various searches have been carried out in relation to the lands and waters within the external boundaries of this application. As a result of these searches, the applicants' solicitors are aware of and have in their possession photocopies of the following:

(i) Lease between the Minister for the Environment and Natural Resources and Irrwanyere Aboriginal Corporation dated 5 October 1995 over Witjira National Park;
(ii) Management Plan for Witjira National Park dated October 1995.

The results of the above searches determine the existence of the following non-native title rights and interests within the external boundaries of this application:

- Pastoral lease
- Lease granted pursuant to s35 of the National Parks and Wildlife Act 1972
- Crown reserve for the purposes of a national park."

I am satisfied that the above information meets the requirements of the s62(2)(c)

Result: Requirements met.

S.62(2)(d) Description of native title rights and interests claimed.

Reasons relating to this sub-condition.

A description of the native title rights and interests claimed by the applicants is contained in Schedule E of the application together with statements that qualify the rights and interests claimed. I have outlined these rights and interests in my reasons for decision in respect of s.190B(4).
I also note that no offshore place is involved in this claim (Schedule P). No claim is made to the ownership of minerals petroleum or gas wholly owned by the Crown (Schedule Q).

Result: Requirements met.

S. 62(2)(e) The application contains 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) the native title claim group have, and the predecessors of those persons had, an association with the area; and
(ii) there exist traditional laws and customs that give rise to the claimed native title; and
(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The decision in *State of Queensland v Hutchison* [2001] FCA 416 at [25] is authority for

the proposition that only material that is part of the application can be relied in support of this requirement.

Information relevant to this subsection is contained in Schedules F, G and M of the application It is my view that the information in Schedules F, G and M amounts to a general description of the factual basis so as to comply with the requirements of s.62(2)(e) (i)-(iii). See my reasons under s.190B(5) for further details of this material.

S.62(2)(e)(i) - ***the native title claim group have, and the predecessors of those persons had, an association with the area.***

In Schedule F of the application the applicants state that the claimants and their ancestors have, since the assertion of British sovereignty, possessed occupied, used and enjoyed the claim area under the laws and customs of the claim group.

In Schedule G of the application the applicants state that the traditional usage of the claimants includes, amongst other things:

- Living, camping and erecting dwellings and shelters in the claim area
- hunting, gathering and cooking bush foods, using medicinal and other resources in the claim area;
- maintaining and protecting the natural environment, including springs and water resources;
- taking care of Aboriginal sites in the area and protecting them from damage, including burial sites;
- maintaining traditional knowledge of the land and waters and passing that knowledge on to younger generations,
- conducting meetings, gatherings, traditional ceremonies and cultural activities in the area
  educating others in the culture, heritage and language associated with the area, and otherwise protecting and preserving such culture and heritage, and
- trading in certain resources of the area.

At Schedule M of the application the applicants state that:

- the claimant people have maintained a traditional physical connection with the land and waters covered by the application and examples are supplied;
- named applicants ordinarily reside in the claim area;
- some members of the claim group were born and grew up in the area and continue to visit and travel through the area,
- other members of the group attend to cultural responsibilities in relation to the area, as did their parents and grandparent as well as engaging in other activities in area as referred to in Schedule G.

I also note that in their s 62 affidavits two of the applicants, **[name deleted]** and **[name deleted]**, indicate that they reside within the Witjira National Park that forms part of the claim area.

s.62(2)(e)(ii) - ***there exist traditional laws and customs that give rise to the claimed native title;***

I refer to the content of Schedule F outlined above in respect of s.62(2)(e)(i).

In addition I refer to the applicants statements in Schedule F that:

- The claim group's possession occupation use and enjoyment of the claim area 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 water 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.
- Traditional law and custom has been transmitted by traditional teaching from generations preceding the present generations to the present generations of persons comprising the native title claim group.
- The claim group continues to acknowledge and observe those traditional laws and customs.

In Schedule G of the application the applicants state, in summary, that the traditional usage of the claimant people includes:

- hunting, gathering and preparing bush food, medicinal and other resources from the lands and waters;
- responsibility for protecting maintaining and caring for the area including areas of significance, such as burial sites;
- teaching others in relation to the culture of the area,
- maintaining traditional knowledge of the area and passing that knowledge on to younger generations.

S.62(2)(e)(iii) - ***the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.***

The material in Schedules F, G and M of the application supports the assertion that the native title claim group has continued to hold the native title in accordance with traditional laws and customs. Refer to the reasons under s.62(2)(e)(ii) above.

At Schedule F the applicants state that the rights and interest claimed are pursuant to the traditional laws and customs of the group. They go on to describe the basis on which, under their traditional laws and customs the rights and interests are vested in members of the native title claim group, how the traditional laws and customs have been passed on and how they continue to be acknowledged and observed.

Schedules G and M of the application provide descriptions of the traditional usage of the claim area by the claimants including, but not limited to, living and camping in the area, using the resources of the area, caring for the area, caring for sites, conducting traditional ceremonies and cultural activities, passing on traditional knowledge of the area to younger generations and using and enjoying the area in accordance with traditional laws and customs as taught to them by their elders.

I conclude that a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and for the particular assertions in sub-paragraphs (i), (ii) and (iii), is found in Schedules F, G and M of the application. As a result, I am satisfied that the requirements of s.62(2)(e) are met.

Result: Requirements met

S.62(2)(f) If native title claim group currently carry on any activities in relation to the area claimed, details of those activities

Reasons relating to this sub-condition

Schedule G of the application lists a number of current activities of the native title claim group associated with the application area. Further particulars of current activities are provided at Schedule M of the application.

I am satisfied that the requirements of s.62(2)(f) are met.

Result: Requirements met

S.62(2)(g) Details of any other application 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)

Reasons relating to this sub-condition

Schedule H of the application states:

- "Native title determination application SG 6016/98 Wangkanguru/Yarluyandi).
- The applicants are not aware of any other applications to the High Court, Federal Court, or a recognised State/Territory body that have been made in relation to the whole or a part of the area covered by this application."

I am satisfied this information meets the requirements of this provision of the Act.

Result: Requirements met

S.62(2)(h) Details of any s.29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of

Reasons relating to this sub-condition

Schedule I of the application states:

> "The applicants are not aware of any notices under s29 of the Act (or under a corresponding provision of a law of a State or Territory) that have been given and that relate to a whole or a part of the area covered by the application."

The Tribunal's Geospatial overlap analysis of 17 June 2002 confirms that no Section 29 or equivalent notices fall within the external boundary of the application.

I find that the requirements of s.62(2)(h) are met.

Result: Requirements met

Summary in respect of s.190C(2).

For the reasons outlined above, I consider that the application **passes** the conditions contained in s.190C(2).

S.190C(3)

Common claimants in overlapping claims:

The Registrar must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:

(a) the previous application covered the whole or part of the area covered by the current application; and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made: and

(c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.

Reasons for the Decision

If all three conditions nominated at section 190C(3) apply, I must consider whether any person included in the native title claim group was a member of the native title claim group(s) for any previous application(s).

Section 190C(3)(a) requires that the previous application cover the whole or a part of the area covered by the current application. A search of the Schedule of Native Title Applications, Register of Native Title Claims and Geospatial's overlap analysis dated 17 June 2002 identified one application that overlaps this current application.

Condition (b) of s.190C(3) is that an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made (26 May 1999). Thus this provision is applicable.

Condition (c) of s.190C(3) requires that potential previous application(s) must have been entered onto (or not removed from) the Register as a result of consideration under s.190A (the Registration Test.) This provision is not applicable.

Therefore, there is no claimant application that meets the criterion in subsection 190C(3)(c), and as such, no further consideration of the application under this section is required. I am satisfied the application does not contravene the section.

Result: Requirements met

S.190C(4)(a) or s.190C(4)(b)

Certification and authorisation:

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

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

(b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Note: s.190C(5) – Evidence of authorisation:
If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and

(b) briefly set out the grounds on which the Registrar should consider that it has been met.

Reasons for the Decision

The application is certified by the Aboriginal Legal Rights Movement Inc. (ALRM) pursuant to section 203BE(1)(a) of the Act.

Schedule R(1) of the application states that the application is being certified by the representative Aboriginal Torres Strait Islander Body (ALRM) and that the certification report would be lodged with the Tribunal within seven days of its receipt. The certification report, which addresses the requirements of 203BE(2)(a) and (b), 203BE(3) and 203BE(4)(a) and (b), was provided to the Tribunal 20 August 2002.

The Aboriginal Legal Rights Movement Inc. is the sole Aboriginal/Torres Strait Islander representative body that could certify the application under Section 203BE. I am satisfied that it is the proper body to provide the required certification.

The certification report is signed and dated 15 August 2002 by Allan Wanganeen, Acting CEO, ALRM Inc.

The representative body must not, in summary, certify under 203BE(1)(a) unless it is of the opinion that:

- proper authorisation has occurred, and
- all reasonable efforts have been made to ensure that the application describes or otherwise identifies all persons in the native title claim group.

The ALRM has provided an opinion that proper authorisation has occurred and that all reasonable efforts have been made by or on behalf of the applicants to ensure that the application describes or otherwise identifies all persons in the native title claim group. Therefore, I am satisfied that the ALRM has met its requirements under the Act and that

the applicants have authority to lodge this application and deal with matters arising in relation to it.

I note that the Tribunal became aware late last year that one of the named applicants had died. There is nothing before me to indicate that the remaining applicants are no longer authorised.

Result: Requirements met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

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 and waters.

Reasons for the Decision

Map and External Boundary Description

(a) The Area Covered by the Application

Schedules B and C refer to a map, which is provided as Attachment C to the application.

Attachment C is an A3 colour map that was prepared by the Tribunal's Geospatial Analysis & Mapping Branch 6 June 2002. The map shows the external boundary of the application using bold outline, reference topographic imagery, scale, datum, legend, north point, locality map, source notes and co-ordinates. Referenced native title claimant applications are depicted by dashed outlines.

Further, at Schedule B (prepared by the Tribunal's Geospatial Analysis & Mapping Branch 21 June 2002) the applicants identify the area claimed to include land and waters within the external boundary outlined on the map that is provided as Attachment C. The external boundaries are then described with reference to:

- administrative boundaries (the State border and the boundaries of Witjira national park);
- Macumba station pastoral lease;
- the Macumba river, and
- NTC applications SG6010/98 (SC96/003) Eringa #1 and SG6025/98 (SC98/002) Arabunna.

Schedule B also states:
"To the extent of any inconsistency between the map at "Attachment C" and the above description, the above description shall prevail."
The Tribunal's Geospatial Unit provided an assessment dated 19 June 2002 that states

the description and map are consistent and clearly identify the application area with reasonable certainty. I accept that expert advice.

Internal Boundaries

The applicants provide details in Attachment B to the application as follows.

> "Areas within the external boundaries that are not covered by the Application:
>
> 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 for those areas of land or waters over which prior extinguishment may be disregarded in accordance with the provision of either s47, s47A or s47B of the *Native Title Act* (1993) (NTA).
>
> In particular the following are excluded:
>
> 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.
>
> For the avoidance of doubt, the following acts which occurred on or before 23 December 1996, where valid (including because of Division 2 or 2A of Part 2 of the NTA) are included or, for present purposes, are to be treated as included, in the definition of "previous exclusive acts", unless excluded from the definition by subsection 23B(9), (9A), (9B), (9C) or (10).
>
> 1. The creation or establishment of:
> I A permanent public work;
> II A dedicated road;
> III An act of adverse dominion where such an act was:
> - Authorised by valid legislation; or
> - Authorised or required by the condition of a valid Crown Grant, vesting or other interest;
>
> IV An unqualified grant of an estate in fee simple.
>
> 2. The grant of:
> I. A schedule interest (see s.249C of the NTA), including an agricultural lease where intensive cultivation of a permanent nature has been carried out and works or structures of permanent nature have been constructed in accordance with the terms and conditions of the lease;
> II. A residential lease on which a residence has been constructed in accordance with the terms and conditions of the lease (see s.249);
> III. A commercial lease on which permanent works or structures have been constructed in accordance with the terms and conditions of the lease (see s.246);

IV. A lease for the provision of community services or amenities within a town or city on which works or structures of a permanent nature have been constructed in accordance with the terms and conditions of the lease (see s249A).

For the avoidance of doubt the Applicants specifically maintain that the land the subject of the lease between the Minister for the Environment and Natural Resources and Irrwanyere Aboriginal Corporation dated 5 October 1995 is included within the area covered by this application (and is not excluded for any of the reasons set out above). The Applicants maintain that the lease did not extinguish Native Title for the following reasons:

- Whilst it was a lease granted pursuant to s.35 of the National Parks and Wildlife Act 1972, it was not a lease solely or primarily for any of the purposes specified in s.39(11) of Part 5 of Schedule 1 of the Native Title Act 1993 (as amended);
- The lease was expressly granted:
  "for the purposes of the use and occupation by Aboriginal people having traditional association with the Park, the enhancement of the cultural and social aspirations of the said Aboriginal people and to achieve the management objectives of the Park".
- The lease was further expressed not to operate to have any extinguishing effect on the native title rights and interests of the said Aboriginal people."

In my view the information in the application enables the internal boundaries of the application area to be adequately identified. Accordingly I consider that the description provides a reasonable level of certainty in regard to whether native title rights and interests are claimed in relation to particular areas of land or waters within the external boundaries of the area the subject of the application.

Whether the exclusions identified are sufficient to meet the conditions of s.190B(8) and (9) is not considered here. I refer to my reasons for decision in relation to those sections.

Conclusion

I find that the description and map contained in the application 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.

The requirements of s.62(2)(a), s.62(2)(b) and s.190B(2) are met.

Result: Requirements met

s.190B(3)

Identification of the native title claim group:

The Registrar must be satisfied that:
(a) the persons in the native title claim group are named in the application; or

(b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Reasons for the Decision

To meet this condition, the description of the claim group must be sufficiently clear so that it can be said with reasonable certainty whether any particular person is a member of the native title claim group.

A list of names of all the persons in the native title claim group has not been provided in the application, so the requirements of section 190B(3)(a) are not met.

In the alternative, section 190B(3)(b) requires me to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group. It is my view that the section requires such a description to appear in the application itself.

Pursuant to the requirements of s.190B(3), the native title claim group is said to comprise those people (now alive) who are the biological descendants of named apical ancestors or certain named individuals related by traditional principals of descent to named apical ancestors, and other named individuals and their biological descendants.

Attachment A further describes the principles of incorporation into the Eringa native title claim group according to traditional law and custom thus:

> "Principles of incorporation into the Eringa native title claim group according to traditional law and custom include:
> - Being of Aboriginal descent, and
> - Having a connection with the claim area in accordance with the traditional laws and customs of the native title group which includes the principle of descent from their ancestors. The principle of descent includes but is not limited to biological descent. It also includes, for example, the principle of descent by means of claim group members' associations with spiritual ("Dreaming") sites and areas within the claim land;
> - Identifying as, and being acknowledged by other members of the native title claim group as being, a person of:
>   - Lower Southern Arrernte descent or
>   - Luritja/Yankunytjatjara/Antakirinja* descent or
>   - Both of the above by means of parents, grandparents or association with the spiritual ("Dreaming") sites and areas within the claim land.
>
> *Members of the Eringa native title claim group acknowledge that the terms "Luritja", "Yankunytjatjara" and "Antakirinja" are used interchangeably by them and constitute different means of identifying the same language and the same individuals from whom claim group members are descended or referred to by other."

It is not necessary to ascertain now whether a particular individual is a member of the group. It is necessary only to be satisfied that, on the information provided, this can be ascertained.

I note that in *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that:

> "[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently….The Act is clearly remedial in character and should be construed beneficially."

I am satisfied that the description of the native title claim group provides an objective means of verifying the identity of members of the native title claim group such that it can be clearly ascertained whether any particular person is in the group and therefore satisfies the requirements of s.190B(3)(b).

Result: Requirements met

s.190B(4)

Identification of claimed native title:

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

Reasons for the Decision

Section 190B(4) requires the Registrar (or delegate) to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. Thus, for the purposes of the condition only the description contained in the application can be considered.

Section 62(2)(d) requires that the application contain *"a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law."* This terminology suggests that the legislative intent of the provision is to ensure that native title rights and interests described in a manner that is vague, or unclear are not accepted for registration.

Furthermore, the use of the terms 'native title' and 'native title rights and interests' excludes any rights and interests that are claimed but are not native title rights and interests as defined by s.223 of the *Native Title Act 1993* (Cth).
S.223(1) reads as follows:

> 'The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
(c) the rights and interests are recognised by the common law of Australia'.

Some interests which may be claimed in an application may not be *native title rights and interests* and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests that fall outside the scope of s.223. Certain rights have been found by the courts to fall outside the scope of s.223. Rights which are not readily identifiable include:

- the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters (*Western Australia v Ward* (2002) 191 ALR 1, para [59])
- rights to minerals and petroleum under relevant legislation (*Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688)
- an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters (*Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145).

The applicants claim the following native title rights and interests at Schedule E:

"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:

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;
(1.1.2) the right to take, use, enjoy and develop the natural resources of the claim area;
(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;
(1.1.4) the right to a share of the benefit of resources taken on the claim area by others.

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;

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

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 under that traditional law and custom);

(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;

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

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 of have been transmitted."

The above rights and interests are subject to the following qualifications set out in Schedule E:

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

- all existing non-native title rights and interests (see for example those referred to in Schedule D);
- all laws in South Australia made in accordance with ss.19, 22F, 23E or 23I of the *Native Title Act*;

to the extent that these are now valid and applicable."

At Schedule Q the applicants state that they do not claim 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 the State of South Australia. No claim is made in respect of any offshore place: Schedule P.

I also note that at Schedule L, the applicants claim the benefit of ss.47, 47A and 47B.

Identifiable Rights and Interests

In correspondence received from the applicants' representative, dated 5 December 2002, and provided in response to correspondence sent by the Tribunal 12 November 2002, the following is asserted:

> "In relation to the rights described in the first paragraph of Schedule E at (ii) and the rights described at paras 1.3.1 and 1.3.2 of that Schedule, it is not accepted that these claimed rights and interests have not been readily identified for the purposes of 190B(4). However, it is acknowledged that, in light of *Ward*, the assertion of these rights as native title rights is not sustainable."

In further correspondence dated 9 January 2003, the applicants' representative states:

> "I confirm that the reference to (ii) of Schedule E on page 2 of my letter 5 December 2002 should have been (iii)."

In correspondence received from the Crown Solicitor's Office, dated 24 December 2002 and 10 January 2003, the following is asserted respectively:

> "I note that the applicants accept that, following *Ward*, the assertion of rights and interests at 1.3.1 and 1.3.2 and (ii) [should this read (iii)?] of Schedule E to the Form 1 are not sustainable."

> "It is the State's submission that the rights claimed in paragraphs 1.1.4, 1.2.1 and 1.2.2 of Schedule E to the Form 1 are not native title rights and interests and are therefore not registrable."

I have considered the submissions in the above letters.

I have also considered the description of native title rights and interests in the present application in light of previous judicial findings.

Re: Schedule E(iii), paras. (1.3.1) and (1.3.2):
In *Western Australia v Ward* 191 ALR 1 (*Ward)*, the High Court confirmed that a right to protect and prevent the misuse of cultural knowledge does not amount to a right in the land or waters and is not therefore a right or interest which is readily identifiable:[64]. Their Honours considered that "recognition" of such a right went beyond denial or control of access to land and would involve, for instance, the restraint of visual or auditory reproductions of what was to be found, or what was to take place there. Their Honours stated:

> "However, it is apparent that what is asserted goes beyond [a right to control access] to something approaching an incorporeal right akin to a new species of intellectual property…[t]he 'recognition' of this right would extend beyond denial or right of access to land held under native title…It is here that the second and fatal difficulty appears" at [59].

I note that the right claimed at (1.3.1) contains the phrase ' including places of significance'. In my view the addition of this phrase does not cure the difficulty referred to by their Honours. What is asserted is not the right to control access to those places but rather the right to control access to knowledge in relation to them. That, in my view, goes beyond a right to control access to land and waters. As a result, I am of the opinion that the right claimed at (1.3.1), along with those claimed at (iii) and (1.3.2), is not readily identifiable for the purposes of s.190B(4).

Re: Schedule E para. (1.1.4):
In *Yarmirr & Ors v The Northern Territory of Australia & Ors* [1998] 771 FCA, Justice Olney found:

> "The "right of senior members of the *yuwurrumu* to receive a portion of major catches ... if they are co-resident with the person making the catch" (Peterson and Devitt) and "the right of clan members to receive a portion of a major catch taken from the waters or land of the clan's estate" (paragraph (d)(viii) of the proposed determination) are not rights and interests in relation to lands or waters and do not come within the ambit of the statutory definition of "native" title rights and interests". "[118]

The right claimed in (1.1.4) is in my view akin to that in *Yarmirr.*

Therefore, I find that the rights and interests described at Schedule E (iii), (1.1.4), (1.3.1) and (1.3.2) are not readily identifiable as native title rights and interests under the Act.

I am of the view that the remaining claimed native title rights and interests are readily identifiable. My reasons in relation to those rights and interests that may be *prima facie* established are found under the heading in respect of s.190B(6) below.

Result: Requirements met

S.190B(5)

Sufficient factual basis:

The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:

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

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

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

Reasons for the Decision

Section 190B(5) requires that the Registrar (or his delegate) must be satisfied that the factual basis provided in support of the assertion that the claimed native title rights and interests exist is sufficient to support that assertion. In particular, the factual basis must be sufficient to support the assertions set out in sub-paragraphs (a), (b) and (c).

The Registrar (or his delegate) is not limited to consideration of statements contained in the application (as is the case for s.62(2)(e)) but may refer to additional material supplied to the Registrar in order to be satisfied that the requirements of s190B(5) have been met: *Martin v Native Title Registrar* [2001] FCA 16. Thus, regard may be had to the application as a whole and, subject to s.190A(3); also to relevant information supplied to the Tribunal that is not contained in the application. I have also had regard to information provided to the Tribunal in another application filed by the native title claim group.

If the application is to meet the requirements of this subsection I must be satisfied that there is a sufficient factual basis to support the assertion that the *"native title rights and interests* claimed exist".

The phrases 'native title' and 'native title rights and interests' are defined, for all purposes, in s223 of the NTA.

S.223 states:

> "(1) The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
> (c) the rights and interests are recognised by the common law of Australia."

The High Court decision in *Members of the Yorta Yorta Aboriginal Community v Victoria [2002]* HCA 58 (Yorta Yorta) has provided further interpretation of the phrase 'native title rights and interests' which assists in regard to the requirements of s190B(5). In brief, the reference to 'traditional' laws and customs in s.223 is a reference to a body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty. Acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty: see Yorta Yorta at [86] and [87].

Attachment A to the application states in part:

> "Principles of incorporation into the Eringa native title claim group according to traditional law and custom include:
> - Being of Aboriginal descent, and
> - Having a connection with the claim area in accordance with the traditional laws and customs of the native title group which includes the principle of descent from their ancestors. The principle of descent includes but is not limited to biological descent. It also includes, for example, the principle of descent by means of claim group members' associations with spiritual ("Dreaming") sites and areas within the claim land;
> - Identifying as, and being acknowledged by other members of the native title claim group as being, a person of:
> - Lower Southern Arrernte descent or
> - Luritja/Yankunytjatjara/Antakirinja* descent or
> - Both of the above by means of parents, grandparents or association with the spiritual ("Dreaming") sites and areas within the claim land.
>
> *Members of the Eringa native title claim group acknowledge that the terms "Luritja", "Yankunytjatjara" and "Antakirinja" are used interchangeably by them and constitute different means of identifying the same language and the same individuals from whom claim group members are descended or referred to by other."

The applicants state the following at Schedule F:

> "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 their 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 made;

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

Schedules G asserts that members of the claim group continue to possess, occupy, use and enjoy the claim area and provides a list of current activities on and associated with the claim area. These activities include:

- living and camping in the claim area;
- erecting dwellings and other shelters in the claim area;
- hunting, gathering, preparing and cooking bush food, medicinal and other resources in the claim area;
- working in the claim area and undertaking activities in the claim area for economic benefit;
- maintaining and protecting the natural environment in the area including springs and other water sources;
- 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.

The applicants state the following at Schedule M:

> "Members of the claim group have continuously had, and continue to maintain, a traditional physical connection with sites and areas within the claim land. For example the named applicants **[name deleted]**, (Name withheld for cultural reasons) and **[name deleted]** ordinarily reside within Witjira National Park, a portion of which is within the claim area.
>
> Some members of the claim group, and their ancestors, were born on and grew up in the claim area. For example Colleen Warren was born in 1949 on that part of Macumba Station which lies within the claim area. Her mother, **[name deleted]**, was born at Ilbinga Siding, immediately to the west of the claim area. **[name deleted]** continues to visit and travel through the claim area with her family, and engages in such other activities in the country as are referred to in Schedule G.
>
> Other members of the claim group attend to cultural responsibilities in relation to the claim area fulfilled in the past by their parents and grandparents, and continue to transmit aspects of the cultural heritage of the area to their children and grandchildren, as well as engaging in such other activities as are referred to in Schedule G.
>
> Members of the claim group maintain their connection to the claim area, and use and enjoy the area as indicated above, because it is their ancestral lands. They do so in accordance with their traditional laws and customs as taught to them by their elders."

Further additional material dated 22 and 28 July 2002, 9 August 2002, 5 December 2002, 9 January 2003, 14 March 2003 and 1 April 2003, in support of satisfying this condition, was provided to the Tribunal by the applicants' representative. This material also refers to and seeks to rely on information provided 31 May 1999 in relation to the SG6010/98 Eringa #1 application that is held on the Tribunal files. The information was provided under cover of a letter dated 31 May 1999 signed by Georgina Reid who was formerly the legal representative for the applicants. As I noted above, the western boundary of the Eringa #2 application, the subject of this registration test, is coincident to the eastern boundary of the Eringa #1 application. The Eringa # 1 application includes, amongst other areas, that portion of the leased area of the Witjira National Park that is not covered by the Eringa #2 application, and the Eringa #1 application is brought on behalf of the same claimant group with the same named people being authorised as applicants. I also note that **[name deleted]**, **[name deleted]** and **[name deleted]** depose in their affidavits sworn 9 July 2002 that the information in their affidavits provided for the purposes of the Eringa #1 application applies equally to the Eringa #2 claim area. They also confirm that the content of their earlier affidavits is true.

On the basis of the above, I am satisfied that the information provided in support of the Eringa # 1 application is also relevant to this application.

The additional material provided to the Tribunal, including the material referred to that is already held on the Tribunal files, consisted of, inter alia, affidavits sworn by members of the native title claim group. The material includes:

- affidavits sworn by **[name deleted]**. (23 May 1999), **[name deleted]** (31 May 1999) and **[name deleted]** (24 May 1999);
- the affidavits referred to above sworn by **[name deleted]** (9 July 2002), **[name deleted]** (9 July 2002) and **[name deleted]** (9 July 2002) that refer to affidavits also sworn by them in May 1999 in relation to Eringa #1;
- affidavits sworn in July 2002 by **[name deleted]** (9 July 2002) and **[name deleted]** (28 July 2002);
- affidavit sworn on 10 March 2003 by **[name deleted]**;
- copies of the Management Plan for Witjira National Park, a Heritage Survey of Witjira National Park called "Keeping Culture Strong", a paper on Aboriginal Participation in National Parks called "Competing Interests", of which Susan Woenne-Green was one of the authors , excerpts from a publication by Kim Doohan entitled "One Family, Different Country", excerpts from a book edited by Adele Pring entitled "Women of the Centre", and
- two anthropologist's reports prepared for the applicants' legal representative by Susan Woenne-Green dated 5 December 2002 and 13 March 2003.

The Crown Solicitor's Office (CSO) was invited to make comments on the additional material provided. Correspondence was received from the CSO on 6 August 2002, 4 September 2002, 19 November 2002, 18 and 24 December 2002, 10 January 2003 and 26 March 2003.

The anthropologist's report prepared by Susan Woenne-Green and dated 5 December 2002, refers to the knowledge and experience she has gained from consulting and working with the claimants since 1999, expresses a familiarity with the laws and customs by which the claimants define themselves and one another as traditional owners, a familiarity with the means by which traditional laws and customs give rise to rights and interests in respect of the land and within the claimant group, and a familiarity with the traditional laws and customs that give rise to the mechanisms by which claimants have authority to speak for the land. The report also provides information regarding traditional laws acknowledged and customs observed in respect of Eringa #1 and Eringa #2, and some of this information is further supported by one of the named applicants in the form of a sworn affidavit.

[Information deleted that was supplied in confidence for the purposes of the registration test]

Correspondence received from the CSO, under signature of Ms Katherine Betschart and dated 24 December 2002, states in part:

> "On the question of the factual basis for the native title rights and interests claimed, the report from Ms Woenne-Green adds little to the material provided to you. In so far as it adopts the language of making decisions about or speaking for

> land, it appears to go against the concessions made by Mr Bradshaw and the principles in the most recent cases (*Ward, De Rose & Yorta Yorta)*."

Further,

> "… the affidavit material should provide prima facie evidence of the claimants' connection to the society holding native title at sovereignty (*Yorta*) and provide evidence of the continued observance of the relevant traditional laws ad customs connecting the claimants to the land. Whilst the affidavits supply some evidence of individual traditional laws and customs, they do not support the rights and interests in the broad (and sometimes vague) way in which they are drafted in the Form 1. By way of example, **[name deleted]** deposes to collecting wood to make artefacts and selling some of those, but that does not support a wide right such as that described in paragraph 1.1.3 of Schedule E to the Form 1."

In the letter from Georgina Reid dated 31 May 1999, she states the following in respect of paragraph 1.1.3 of Schedule E to the Form 1:

> "Members of the claim group and their ancestors have, and continue to, make a living and derive economic benefit from the claim area. For example one of the named applicants herein, **[name deleted]**, is employed as a Ranger in Witjira National Park.
>
> The contemporary exercise of this right has been acknowledged by the Government, and is reflected in the Witjira National Park Management Plan (pp 48-49), which allows for employment and other economic opportunities for members of the claim group in the Park.
>
> Although the takeover of much of their land and water resources by white settlers and pastoralists severely affected members of the claim group and their ancestors, many of them have continued to live and work in their country, including on the pastoral properties within the claim area, for significant periods of their lives whilst still maintaining traditional connections with the claim land.
>
> > *"Shepherding and boundary riding, coincidentally, fitted Aboriginal patterns of economic and social life well. At the same time, indigenous practices were altered by resource competition brought about by pastoral demands and the use of new technologies, such as domesticated animal transport and rifles. These were the days of few rations or station supplies, when pastoralists relied on small 'family units' of aborigines working as shepherds. …I was repeatedly told by elderly informants that, as children, hunting and gathering and learning about country with their families were combined with moving stock from one water source to another or scouting for feed. Thus, the work rounds demanded by pastoral employers, far from extinguishing Aboriginal mobility patterns and land use practices, encouraged them…"* (Doohan, 1992:p44)
>
> We refer you also to the Affidavits of: **[name deleted]** ([paras. 18, 19, 22, 23, 26, 28); **[name deleted]** (para. 6); **[name deleted]** (paras. 4, 6, 18, 19, 21)."

In correspondence dated 9 January 2003, the applicants' legal representative refers to the submissions made by the CSO and states in part:

> "In the first full paragraph on page 2 of her letter, she suggests that the affidavit material provided to date is insufficient. However, I note that non-affidavit material has also been provided, including a copy of Ms Woenne-Green's letter, Attachment A to the amended Form 1 application and the letter of 31 May 1999 from Georgina Reid then of this firm to the Registrar, including all the attachments to that letter."

Further,

> "Insofar as Ms Woenne-Green's report "adopts the language of making decisions about or speaking for land", she was not going against the concessions made by me or the principles in the most recent cases. Firstly, the rights claimed in para 1.2 of Schedule 3 [sic] continue to be asserted in their unqualified sense in relation to the park area of the claim……Secondly, Ms Woenne-Green is importantly making clear that traditional laws and customs ascribe to members of the claim group the authority to speak for the country and the right to be acknowledged as having that authority. Whether or not these rights translate into a native title right is a separate issue from whether or not, for example, members of the claim group have a connection to the claim area under traditional laws and customs.
>
> The materials provided are consistent with, and supportive of, the proposition that the laws and customs presently acknowledged and observed by the society of the native title claim group are rooted in the laws and customs of the society of the predecessors of the claimants who held native title at the time of sovereignty. In *Yorta Yorta* at para 80 Gleeson CJ, Gummow and Hayne JJ noted as follows:
>
> *"In many cases, perhaps most, claimants will invite the Court to infer, from evidence led at trial, the content of traditional law and custom at times earlier than those described in the evidence."*
>
> In this case, the claimants, will no doubt invite such an inference to be drawn from such evidence as to the content of the laws and customs of the claim group's society and of those of the society of their apical ancestors referred to in the Form 1 application."
>
> Further affidavit material in support of the existence and transmission of traditional laws and customs is provided by one of the named applicants.
>
> **[Information deleted that was supplied in confidence for the purposes of the registration test]**

In her report dated 13 March 2003, Susan Woenne-Green provides a summary of certain archival and contemporary material that is intended, in part, to lend support to what has been deposed in the affidavit.

[Information deleted that was supplied in confidence for the purposes of the registration test]

Correspondence received from the CSO and dated 26 March 2003, states in part:

> "I note Ms Woenne-Green's comments in her report of 13 March 2003, but reiterate that the relevant question post-Yorta Yorta is whether the native title claim group can show the origins of both itself and its traditional laws and customs pre-Sovereignty. My comments in previous letters to you on this application of the registration test remain relevant."

By letter dated 1 April 2003, the applicants' representative responded to the submissions made by the CSO, stating:

> "…I note that, in terms of new material, we have sought to address "the relevant question post-*Yorta Yorta"* primarily through the affidavit of **[name deleted]** dated 10 March 2003 (see, for example, paras 9 to 11 and 14 to 17). Nonetheless, it is submitted that comments in Ms Woenne-Green's report lend support."

I have considered the information provided by the applicants and the submissions of the State in respect of *Yorta Yorta*. I also note the comments of Justice French in relation to the nature of administrative decision making, in *Strickland v Native Title Registrar* (1999) FCA 1530, and that were approved by Carr J in *Ward v Registrar NNTT* (1999) FCA 1732. His Honour states:

> *"44. … It is also necessary to bear in mind the administrative character of the registration test and the time constraints under which it is to be applied. A significant margin of appreciation must be allowed for the experience and detailed administrative knowledge of the Registrar and his delegates in making the largely evaluative judgments on whether applications comply with the statutory conditions of registration. Their reasons are not to be scrutinised finally and minutely with an eye keenly attuned to error* - Collector of Customs v Pozzolanic Enterprises Pty Ltd *(1993) 43 FCR 280 at 287."*

Based on the information before me, I have concluded that an inference can be drawn as to the content of the laws and customs of the claim group's society, through which they are connected to their country, being rooted in the laws and customs of those of the society of their apical ancestors.

[Information deleted that was supplied in confidence for the purposes of the registration test]

In short, I am satisfied that there is sufficient factual basis to support the existence of *traditional laws* acknowledged by, and the *traditional customs* observed by, the relevant people that give rise to the rights and interests claimed.

Before dealing with each particular aspect of this condition it is necessary to clarify that it is not the role of the Delegate to reach definitive conclusions about complex

anthropological issues pertaining to applicants' relationships with the country subject to native title claimant applications. What I must do is consider whether 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 assertions in paras. (a) to (c).

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

In considering this provision, I have had particular regard to the affidavits of eight members of the native title claim group: **[name deleted]** (23 May 1999), **[name deleted]** (31 May 1999), **[name deleted]** (9 July 2002, March 2003), **[name deleted]** (24 May 1999, 9 July 2002), **[name deleted]** (24 May 1999), **[name deleted]** (24 May 1999), **[name deleted]** (24 May 1999) and **[name deleted]** (28 July 2002). I have also had regard to the following documents: "Keeping Culture Strong", Witjira National Park Management Plan, "One Family, Different Country", "Competing Interests" and "Women of the Centre".
On the basis of this information and Attachment A and Schedules F, G and M, it is clear that the native title claim group have an association with the claim area and are descended from people who also had an association with the claim area:

- **[name deleted]** (23/5/1999), paras 3-4, 7-9, 12-16, 18, 26, 30, 34, 36;
- **[name deleted]**l (31/5/1999), paras 3, 5, 9, 12, 14, 16-24, 26;
- **[name deleted]** (9/7/2002), paras 2, 4, 5, 7, 13, 15-16, 19;
- **[name deleted]** (10/3/2003), paras 2, 9, 11, 13, 16, 26, 30-31;
- **[name deleted]** (24/5/1999), paras 3, 5- 6, 9-11, 16-18, 21, 29-32, 36, 38, 40, 49, 50, 52;
- **[name deleted]** (9/7/2002), para 3;
- **[name deleted]** (24/5/1999), paras 3, 5-9, 12, 14-16, 18;
- **[name deleted]** (24/5/1999), paras 5, 9-20, 22;
- **[name deleted]** (24/5/1999) paras 7, 9-20,
- **[name deleted]** (28/7/2002), paras 2, 3, 5-11;
- "Keeping Culture Strong", pp. 4, 6-15, 17, 19-29;
- Witjira National Park Management Plan, pp. 1, 2, 7, 9-11, 13, 15-17, 27, 31, 40, 43-44;
- "One Family Different Country", pp. 22, 23, 25-26, 31-32, 34, 44, 47-48, 50-52;
- "Competing Interests", pp. 155-156, 158;
- "Women of the Centre", pp. 116, 118.

(b) that there exist traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests;

In considering this section I have had particular regard to the affidavits of eight members of the native title claim group: **[name deleted]** (23 May 1999), **[name deleted]** (31 May 1999), **[name deleted]** (24 May 1999), **[name deleted]** (9 July 2002, 10 March 2003), **[name deleted]** (21May 1999, 9 July 2002), **[name deleted]** (24 May 1999), **[name deleted]** (24 May 1999) and **[name deleted]** (28 July 2002). I have also had regard to: "Keeping Culture Strong", Witjira National Park Management Plan, "One Family, Different Country" and "Competing Interests". On the basis of this information,

Attachment A and Schedules E, F, G and M, 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.
I refer to:

- **[name deleted]** (23/5/1999), paras 5-18, 21, 25, 30, 32, 34-36;
- **[name deleted]** (31/5/1999), paras 2-3, 5,12-21, 23-26;
- **[name deleted]** (9/7/2002), paras 2, 4-9, 11-19;
- **[name deleted]** (10/3/2003), paras 2, 5, 7-9, 11, 13-16, 18-31;
- **[name deleted]** (21/5/1999), paras 3, 5-8, 10-11, 16-33, 36, 38, 40-45, 48-50, 52;
- **[name deleted]** (9/7/2002), para 3;
- **[name deleted]** (24/5/1999), paras 3, 5-16, 18;
- **[name deleted]** (24/5/1999), paras 2, 5, 10-13, 14-20, 22;
- **[name deleted]** (24/5/1999) paras 9-15
- **[name deleted]** (28/7/ 2002), paras 1-3, 5-11;
- "Keeping Culture Strong", pp. 10-14, 19-29;
- Witjira National Park Management Plan, pp. 1, 2, 7, 27, 31, 40;
- "One Family Different Country", pp. 26, 32-34, 44, 47-48, 51;
- "Competing Interests", pp. 155-156.

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

For the reasons set out in 190B(5)(b) and having regard to the same material, including Attachment A and Schedules E, F, G and M, I am satisfied that there is a sufficient factual basis to support the claim group having continued to hold native title in accordance with those traditional laws acknowledged and traditional customs observed by the native title claim group that give rise to the claim to native title rights and interests.

Conclusion

I am 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 and the assertions described for each of the criteria set out in s.190(B)(5).

Result: Requirements Met

S.190B(6)
Prima facie case:

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

Reasons for the Decision

Under s.190B(6) I must consider that, *prima facie*, at least some of the native title rights and interests claimed by the native title group can be established. The Registrar takes the view that this requires only one (1) right or interest to be registered.

The term "prima facie" was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) 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 *Oxford English Dictionary* (2nd ed) 1989]."

I have adopted the ordinary meaning referred to by their Honours in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

I have noted already the description of native title rights and interests claimed by the applicants under my reasons for decision for s.190B(4) above. Under my reasons for decision in relation to s.190B(4), I determined that the native title right claimed at (iii), (1.1.4), (1.3.1) and (1.3.2) of Schedule E were not readily identifiable for the purposes of the Act. For the same reasons, those rights are not capable of being established *prima facie* pursuant to s.190B(6). This is not to say that the rights may not exist as a matter of fact among claimant people; rather, as the High Court said in *Ward*, they are not the kind of native title rights or interests that the Act could recognise as a matter of law.

Schedule E lists a number of native title rights and interests (14) claimed over the application area. Although it is not beyond doubt, I am of the view that Schedule E is constructed in such a way that each right is claimed separately and stands or falls independently.

In light of this, I will consider in turn each of the rights and interests claimed in the application and whether these can be established *prima facie* as required by s.190B(6).

Before assessing each of the rights and interests claimed, I will firstly examine the land tenure of the area of the claim. This examination has become necessary in order to apply the findings of the High Court in the *Ward* case.

Land Tenure in the application area:

Information provided by the applicants in Schedule D identifies the following in the application area:

- Crown reserve for the purposes of a national park
- Lease granted pursuant to s35 of the National Parks and Wildlife Act 1972
- Pastoral Lease

<u>Crown reserve for the purposes of a national park (i.e. Witjira NP) and Lease granted pursuant to s35 of the National Parks and Wildlife Act 1972</u>

At Attachment B to the application, the applicants assert that native title is not extinguished in respect of the land within the national park that is the subject of the lease between the Minister for the Environment and Natural Resources and Irrwanyere Aboriginal Corporation, dated 5 October 1995. They state the following reasons:

- "Whilst it was a lease granted pursuant to s.35 of the National Parks and Wildlife Act 1972, it was not a lease solely or primarily for any of the purposes specified in s.39(11) of Part 5 of Schedule 1 of the Native Title Act 1993 (as amended);
- The lease was expressly granted:
  "for the purposes of the use and occupation by Aboriginal people having traditional association with the Park, the enhancement of the cultural and social aspirations of the said Aboriginal people and to achieve the management objectives of the Park".
- The lease was further expressed not to operate to have any extinguishing effect on the native title rights and interests of the said Aboriginal people."

At Schedule L, the applicants state that the "Witjira National Park is an area leased to Irrwanyere Aboriginal Corporation for the benefit of Aboriginal peoples and is occupied by members of the Eringa native title claim group".

The applicants made further submissions to the Tribunal 31 October 2002 in respect of the leased area of the park and in light of *Ward*. Following subsequent communications between the legal representative for the applicants and the CSO, the Tribunal was advised by the applicants' legal representative, in correspondence dated 1 April 2003, that the State's current view, confirmed in an e-mail to him 2 April 2003 and then copied to the Tribunal 4 April 2003, is that subject to the opinion of the Solicitor-General, still pending, the proclamation of the Park, including the simultaneous vesting of it in the Crown pursuant to section 35(2) National Parks and Wildlife Act 1972, constituted a category D past act to which the non-extinguishment principal applies.

The applicants' submissions of 31 October 2002 stated in part:

> "17. … the effect of s10 of the RDA, in the context of an interaction with s35(2) of the NPW Act, is that of the second scenario, as set out in par 107 of *Ward*. On the basis of that scenario, the vesting of Witjira National Park was invalid, but validated by s32 *NT(SA) Act* (pursuant to ss14 and 19 *NTA*). Not being a "*previous exclusive possession act*" by virtue of s23B(9A) of the *NTA*, and not being a *"category A past act"* by virtue of s229(2)(b)(i), the vesting would have been a *"category D past act"*, to which the *"non-extinguishment principle"* applies (s15(1)(d)NTA); s36NT(SA) Act).
>
> 18….it is contended that s47A applies to that part of the Eringa #2 claim area ("the relevant part of the park) which forms part of the "demised premises" as defined in the lease in relation to Witjira National Park between the Minister for the Environment and Natural Resources and Irrwanyere Aboriginal Corporation dated 5 October 1995 ("the lease"). The grounds for this contention are that:
>
> (i) At the time of filing the claim, the relevant part of the park was held, pursuant to the lease, expressly for the benefit of Aboriginal people having traditional association with the park; and

(ii) When the claim was filed, one or more members of the Eringa #2 claim group occupied the relevant part of the park.

19. We draw particular attention to clauses 2.1.1 and 2.1.2 of the lease, as follows:

The Lessee…will, at all times during the term of this Lease, ***control, use and manage*** *the demised premises where practicable in accordance with the Act and the Plan of Management and to satisfy or fulfil, to the extent practicable, the wishes of those persons having traditional association with the Park and* ***in particular for the use and benefit of Aboriginal people having traditional association with the Park****.*

…the Lessee, its members and Aboriginal people may use the demised premises for the purposes of hunting and gathering and traditional Aboriginal ceremonies and for those purposes may have access to the whole of the demised premises…(emphasis added)."

Further,

"21. On the basis of the application of s47A, any prior extinguishment of native title rights and interests in relation to the relevant part of the park must be disregarded, including any extinguishment arising by virtue of the grant of pastoral leases or the proclamation and vesting of the national park (ss47A(2) and 190B(9)(c))."

The CSO was invited to make comments on the applicants' submissions of 31 October 2002. In correspondence dated 19 November 2002, the CSO advised that the State made no submissions in respect of the registration test but reserved the right to make submissions at a future time in the proceedings.

Having considered the information contained in the application, the further submissions made by the applicants, and the communication via e-mail between the applicants' representative and the CSO, and in the absence of any further submissions from the State, I am satisfied that the applicants can claim the benefits of s47A in respect of the lease area and that the proclamation and vesting of the park constituted a category D past act to which the non-extinguishment principal applies.

<u>Pastoral Lease</u>

Pastoral leases in South Australia, which are subject to the provisions of the South Australian *Pastoral Land Management and Conservation Act 1989*, are previous non-exclusive possession acts. This was confirmed in the decision of O'Loughlin J in *De Rose v State of South Australia* [2002] FCA 1342. At para 247 his Honour states:

"It is very difficult to see how it could be said that the 1989 Act has extinguished native title by clear legislative intent; rather, I am satisfied that it has preserved it, even though the contents of s 47 can be seen as having the effect of curtailing some native title rights. It seems inconceivable, in light of the history of the reservations that have been included in pastoral leases and various pieces of relevant legislation, including the provisions of the 1989 Pastoral Act, that it could

> be said that any native title existing in the claim area has been wholly extinguished by force of legislation or by the terms of pastoral leases that have been granted pursuant to that legislation."

I have noted the qualifications to the rights and interests claimed under my reasons in relation to s.190B(4) above. In the last paragraph of Schedule E the applicants state that:

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

At Schedule Q the applicants state:

> "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."

In considering whether the rights claimed by the applicants at Schedule E can be established *prima facie*, I have had regard to Schedules F, G and M, Attachment A, affidavits sworn by members of the native title claim group, including

- affidavits sworn in May 1999 by **[name deleted]** (23 May 1999), **[name deleted]** (31 May 1999), and **[name deleted]** (24 May 1999),
- affidavits sworn on July 2002 by **[name deleted]**, **[name deleted]**. and **[name deleted]**, that refer to affidavits also sworn by them in May 1999,
- affidavits sworn in July 2002 by **[name deleted]** (9 July 2002) and **[name deleted]** (28 July 2002);
- an affidavit sworn on 10 March 2003 by **[name deleted]**.

I have also had regard to:

- copy of the Management Plan for Witjira National Park;
- a Heritage Study of Witjira National Park called "Keeping Culture Strong";
- a paper on Aboriginal Participation in National Parks called "Competing Interests", of which Susan Woenne-Green was one of the authors;
- excerpts from a publication by Kim Doohan entitled "One Family, Different Country",
- excerpts from a book edited by Adele Pring entitled "Women of the Centre", and
- two anthropologist's reports prepared for the applicants' legal representative by Susan Woenne-Green dated 5 December 2002 and 13 March 2003.

i) the right to possess, occupy, use and enjoy the claim area;

Over areas where a claim to exclusive possession cannot be sustained (i.e., where the claim is non-exclusive in nature), the High Court in *Western Australia v Ward* (2002) 191 ALR 1 (*Ward)* has indicated that a claim to 'possession, occupation, use and enjoyment' of the land and waters cannot, *prima facie*, be established. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that "it

will seldom be appropriate or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms": at [51]. Similarly, in *De Rose v South Australia* [2002] FCA 1342, O'Loughlin J said that such a description was "inappropriate": at [918] to [920]. Thus a non-exclusive right to possession, occupation, use and enjoyment cannot, prima facie, be established. That is not to say that such a right cannot be recognised as a native title right by a court. While the majority of the High Court in *Ward* acknowledges this, the court expressed the view that this would be a rare case: see [51].

Notwithstanding the information contained in the application and the affidavits sworn by members of the native title claim group, I find that this right is not, prima facie, capable of being established.

Not established in relation to the claim area.

ii) the right to exercise responsibility under traditional law and custom for the management, care and maintenance of the claim area;

The right of 'management, care and maintenance' of the claim area may suggest that the applicants are claiming a right which amounts to a right to control access to or use of the land of the application area. However what is sought here is the right to exercise responsibility under traditional law and custom for those matters. This suggests to me that the applicants do not intend that the right claimed involves a right to control access to or use of the land.

At Schedule G the applicants state that the native title claim group continues to maintain and protect the natural environment in the area including water sources, make decisions with respect to the management of the area and to care for Aboriginal sites in the area.

The affidavits and other additional information provide evidence to support members of the native title claim group exercising this responsibility, some of which information is referred to below:

- **[name deleted]** (24/5/1999), paras 12, 14, 15;
- **[name deleted]** (23/5/1999), paras 30, 32;
- **[name deleted]** (9/7/2002), paras 7, 9;
- **[name deleted]** (9/7/2002), paras 4, 5, 7, 8, 13;
- **[name deleted]** (10/3/2003), paras 2, 13;
- "Keeping Culture Strong", p. 7;
- Witjira NP Management Plan, pp. 1-3, 10-11, 15-19, 21-22, 25, 30-32, 40, 43-44, 46, 48-50.

See also the qualifying statements made in Schedule E.

Established in relation to the claim area.

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;

The applicants have claimed at (i) above the non-exclusive right to possession, occupation, use and enjoyment. That cannot, prima facie, be established (see (i) above). I believe it follows that that right, and any rights that flows from it cannot be transmitted to others.

In their letter to the Tribunal dated 24 December 2002, the CSO submitted in respect of this claimed right that:
"…the right claimed at paragraph (iv) is superfluous in that, if the claimants are held to have native title rights and interests, then those rights and interests will be transferable in accordance with the traditional laws and customs in any event."

I agree with the CSO's submission to the extent that native title rights and interests are established, but that is not the case here. I add that whilst a non-exclusive right to possession, occupation, use and enjoyment cannot, prima facie, be established, that is not to say, as indicated above, that such a right cannot be recognised as a native title right by a court.

Not established in relation to the claim area.

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;

I note that the notion of access and in particular, occupation, in this context should, in my view, be understood in the sense that indigenous people have traditionally occupied land rather than according to common law principles and judicial authority relating to freehold and leasehold estates and other statutory rights (Olney J in *Hayes v Northern Territory* (1999) 97 FCR 32 at [162]).

A question arises here whether the right to "live on, camp and erect dwellings on the land" *necessarily* amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession could not be sustained.

I note that, despite the absence of exclusive possession in that case, the majority decision in *Ward* did not preclude the recognition of native title rights to reside upon the claim area. To me, "live on" has a similar meaning to "reside on". However, the claim in this right to "erect dwellings" may be seen as conveying an intention of permanency, or capacity on the part of the members of the native title claim group to control access to or use of those areas inconsistent with rights of the pastoral lessee. However, there is ample information before me that indicates it is envisaged that members of the native title claim group will live in and erect dwellings in the claim area within the lease of the Witjira National Park (e.g. Witjira National Park Management Plan pp 44 - 49). It follows that I am satisfied that the right claimed is capable of being established *prima facie* within that part of the claim area.

I add that in my opinion I am not able to break this claim into its constituent parts i.e. separate out "live on" and "erect dwellings", which would have allowed the other components to be established in relation to the pastoral lease area.

At Schedule G the applicants state that members of the native title claim group continue to live and camp in the claim area and erect dwellings and other shelters in the claim area.

The affidavits and other additional information provide evidence in support of members of the native title claim group exercising these rights. I refer to the following:

- **[name deleted]** (23/5/1999), paras 3-6, 8-9, 12, 14-15, 18-19, 22, 24, 26, 28, 30-32, 34, 36;
- **[name deleted]** (31/5/1999), paras 2-3, 5, 9, 12-24, 26;
- **[name deleted]** (24/5/1999), paras 3, 5, 7-9, 12, 14-18;
- **[name deleted]** (24/5/1999), paras 4-5, 9-22;
- **[name deleted]** (21/5/1999), paras 3, 5-6, 9-11, 16-18, 21, 23-24, 27, 29-31, 36-38, 40, 42-44, 48-52;
- **[name deleted]** (24/5/1999), paras 7-9, 13-16, 19, 21-23, 28, 33-34, 36, 38;
- **[name deleted]** (9/7/2002), paras 2-3;
- **[name deleted]** (28/7/2002), paras 1-3, 5-11;
- **[name deleted]** (9/7/2002), paras 2, 5, 7-16, 19;
- **[name deleted]** (10/3/2003), paras 29, 30;
- "Keeping Culture Strong", pp. 6-28;
- Witjira National Park Management Plan, pp. 1-2, 7, 9-11, 15-19, 21-22, 25, 27-28, 30-31, 35-36, 39-41, 44-51.

See also the statements made in Schedules E and L.

Established in relation to the claimed land within the Witjira National Park that is the subject of the lease between the Minister for the Environment and Natural Resources and Irrwanyere Aboriginal Corporation dated 5 October 1995.

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

The applicants state at Schedule G that the native title claim group continues to hunt gather, prepare and cook bush food, medicinal and other resources in the claim area.

The affidavits and other additional information provided by the applicants support a finding that members of the native title claim group exercise the rights claimed. I refer to the following:

- **[name deleted]** (23/5/1999), paras 10-11, 31;
- **[name deleted]** (31/5/1999), paras 13-14;
- **[name deleted]** (21/5/1999), paras 23-28;
- **[name deleted]** (24/5/1999), paras 21-23;
- **[name deleted]** (28/7/2002), para 10;
- **[name deleted]** (9/7/2002), paras 9, 11-12, 14;

- **[name deleted]** (10/3/2003), paras 29-30;
- Witjira NP Management Plan, pp. 7, 19, 25, 27-28, 45.

See also the statements made in Schedules E and Q limiting the scope of the claim.

Established in relation to the claim area.

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;

In *Commonwealth v Yarmirr* (1999) 101 FCR 171, Olney J considered the 'right to engage in the trade and exchange of estate resources' of senior *yuwurrumu* members of the Croker Island region. Ultimately, Olney J found that "[t]he so-called 'right to trade' was not a right or interest in relation to the waters or land" [para. 120], and was, therefore, not capable of being claimed as a native title right and interest under s. 223 of the Act.

On appeal, the Full Federal Court spoke of this right in these terms: "It may well be right, as the argument runs, and as seems logical, to view the right to trade as 'an integral part,' or integral aspect of a right to exclusive possession." The Full Court noted that Olney J had not considered the right to trade as a right in relation to land and water within the meaning of s.223 of the *NTA*, but made no finding on the issue. The issue was not raised before the High Court.

Based on these comments, it appears that the Full Court accepted that this right was a native title right or interest in relation to land and water (i.e., that the right to trade is readily identifiable for the purposes of s.190B(4)) and that the right to derive economic benefit from and to trade in the traditional resources of the claim area is properly seen as co-extensive with a claim to *exclusive* possession, occupation, use and enjoyment of lands and waters [my emphasis].

The right claimed at (1.1.3) is a non-exclusive 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*" that appears akin to a right to share, exchange or trade in resources. In my view it does not appear to be capable of being established *prima facie* pursuant to s.190B(6).

Not established in relation to claim area.

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;

By letter dated 5 December 2002 in response to a letter from the Tribunal the applicants' legal representative submitted, in part, as follows:

" It is acknowledged that in light of the High Court's decision in *Ward*, a claim to

exclusive rights is not sustainable, subject to the effect of s47A in relation to Witjira National Park. Furthermore, it is noted that no claim to exclusive possession as such is asserted in Schedule E to Form 1. Furthermore the particular non-exclusive rights claimed to use occupy and enjoy the claim area have been specified in that Schedule.

With particular regard to the rights claimed in para 1.2 of that Schedule (Control and Management), I submit that the claimed native title rights and interests are sustainable in relation to that part of the claim area comprising part of Witjira National Park having regard to s 47A. However, it seems, that in light of *Ward*, an assertion of those rights and interests is not sustainable in relation to the balance of the claim area. In the circumstances, I ask the Registrar to treat the assertion of the rights claimed in para 1.2 in their unqualified sense as limited to the park area of the claim.

In relation to the balance of the claim area, the asserted rights are to be understood in the following qualified sense:

- the right to make decisions about the use and enjoyment of the claim area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders (ie. the persons in the native title claim group);
- the right to control the use and enjoyment of the claim area and the resources of the claim area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;
- the right to grant access to the claim area to Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;
- the right to refuse access to the claim area to Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders.

In relation to the rights described in the first paragraph of Schedule E at (ii) and the rights described in paras 1.3.1 and 13.2 of that Schedule, it is not accepted that these claimed rights and interests have not been readily identified for the purposes of s 190B (4). However, it is acknowledged that, in light of Ward, the assertion of these rights as native title rights is not sustainable." The reference to (ii) was later corrected to (iii)

By letter dated 24 December 2002 the CSO submitted in response to the above as follows:
" I note that the applicants accept that, following Ward, the assertion of rights and interests at 1.3.1 and 1.3.2 and (ii).....of Schedule E are not sustainable. I further note that they qualify the rights and interests in paragraph 1.2 with regard to the non national park areas of the claim to apply only to those others in the native title claim group. In relation to both these matters, the application should be amended to reflect the changes".

I have considered the above submissions and I am of the opinion that the claimed native title rights and interests are sustainable in relation to that part of the claim area comprising part of Witjira National Park having regard to s 47A. I am of the view that as

claimed in the application those rights and interests are not sustainable in relation to the balance of the claim area.

At Schedule G the applicants state that the members of the claim group:

- make decisions with respect to the use and management of the claim area
- maintain and protect the natural environment including springs and other water sources, and
- take care of Aboriginal sites and protect them from damage.

The affidavits and other additional information provide evidence of members of the native title claim group exercising these rights, some of which is detailed below:

- **[name deleted]** (24/5/1999), paras 12, 14-16;
- **[name deleted]** (28/7/2002), paras 7, 9;
- **[name deleted]** (9/7/2002), paras 4, 13;
- **[name deleted]** (10/3/2003), paras 2, 13;
- "Keeping Culture Strong", pp. 7-10;
- Witjira NP Management Plan, pp. 1-3, 10-11, 15-19, 21-22, 28-29, 31-35, 37-40, 48-50.

See also the statements made in Schedules E, L and Q.

Established in relation to the claimed land within the Witjira National Park that is the subject of the lease between the Minister for the Environment and Natural Resources and Irrwanyere Aboriginal Corporation dated 5 October 1995.

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

Please see my reasons under 1.2.1) above.

The affidavits and other additional information provide evidence of members of the native title claim group exercising these rights, some of which is detailed below:

- **[name deleted]** (24/5/1999), paras 12, 14-16;
- **[name deleted]** (28/7/2002), paras 7, 9;
- **[name deleted]** (9/7/2002), para 13;
- **[name deleted]** (10/3/2003), paras 2, 13;
- Witjira NP Management Plan, pp. 1-3, 10-11, 15-19, 21-22, 29, 31-40, 43-44, 48-50.

See also the statements made in Schedules E, L and Q.

Established in relation to the claimed land within the Witjira National Park that is the subject of the lease between the Minister for the Environment and Natural Resources and Irrwanyere Aboriginal Corporation, dated 5 October 1995.

1.3 Cultural

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

At Schedule G the applicants state in summary that they continue to conduct cultural activities in the claim area including:

- hunting and gathering;
- taking care of Aboriginal sites, including burial sites;
- conducting meetings and gatherings in the area
- conducting traditional ceremonies
- visiting the area with their children and teaching their knowledge of language, culture, heritage and tradition associated with the area.
- educating others in respect of the culture, heritage and language associated with the area and protecting and preserving the same.

At Schedule M the applicants state, in part:

> "Other members of the claim group attend to cultural responsibilities in relation to the claim area fulfilled in the past by their parents and grandparents, and continue to transmit aspects of the cultural heritage of the area to their children and grandchildren, as well as engaging in such other activities as are referred to in Schedule G.
>
> Members of the claim group maintain their connection to the claim area, and use and enjoyed the area as indicated above, because it is their ancestral lands. They do so in accordance with their traditional laws and customs as taught to them by their elders."

The affidavits and other additional information supplied by the applicants provide information to support this claimed native title right. Some of that information is set out in the following affidavits and documents:

- **[name deleted]** (23/5/1999), paras 10, 12, 15, 30-32, 36;
- **[name deleted]** (31/5/1999), paras 12-14, 16-21, 23-24, 26;
- **[name deleted]** (24/5/1999), paras 18, 22;
- **[name deleted]** (24/5/1999), paras 14, 15;
- **[name deleted]** (21/51999), paras 23-24, 26-32, 38-39, 42-44, 50;
- **[name deleted]** (24/51999), paras 21-23, 36;
- **[name deleted]** (28/7/2002), paras 5, 7, 10;
- **[name deleted]** (9/7/2002), paras 7-14, 19;
- **[name deleted]** (10/3/2003), paras 29-30;
- "Keeping Culture Strong", pp. 14, 29;
- Witjira NP Management Plan, pp. 7, 27-28, 35.

See also the statements made in Schedule E.

Established in relation to the claim area.

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 of have been transmitted.

I have read "of" in the above as "or".

At Attachment A the applicants describe the native title claim group as being comprised of those people (now alive) who are the biological descendants of named apical ancestors or certain named individuals related by traditional principals of descent to named apical ancestors, and other named individuals and their biological descendants.

Attachment A further describes the principles of incorporation into the Eringa native title claim group according to traditional law and custom thus:

> "Principles of incorporation into the Eringa native title claim group according to traditional law and custom include:
> - Being of Aboriginal descent, and
> - Having a connection with the claim area in accordance with the traditional laws and customs of the native title group which includes the principle of descent from their ancestors. The principle of descent includes but is not limited to biological descent. It also includes, for example, the principle of descent by means of claim group members' associations with spiritual ("Dreaming") sites and areas within the claim land;
> - Identifying as, and being acknowledged by other members of the native title claim group as being, a person of:
>   - Lower Southern Arrernte descent or
>   - Luritja/Yankunytjatjara/Antakirinja* descent or
>   - Both of the above by means of parents, grandparents or association with the spiritual ("Dreaming") sites and areas within the claim land.
>
> *Members of the Eringa native title claim group acknowledge that the terms "Luritja", "Yankunytjatjara" and "Antakirinja" are used interchangeably by them and constitute different means of identifying the same language and the same individuals from whom claim group members are descended or referred to by other."

The affidavits provided in support of the application provide evidence of how the deponents derive their membership of the native title claim group and the passing on of connection to country from one generation to the next. They know they are members of a group of people who have rights to the area because of their decent. In my view the members of the group can determine in accordance with traditional law and custom, the persons to whom native title rights and interests in the claim area are transmitted or have been transmitted.

[Information deleted that was supplied in confidence for the purposes of the registration test]

I also refer to the following information that supports this claim:
- **[name deleted]** (24/5/1999), paras1-13, 18-20;
- **[name deleted]** (21/5/1999), para 50;
- **[name deleted]**H (28/7/2002), para 9;
- **[name deleted]** (9/7/2002), para 17;
- **[name deleted]** (10/3/2003), paras 2, 13.

Established in relation to the claim area.

Conclusion

In summary, I am satisfied that the following rights have been established:

- Established in relation to the whole claim area:
  - (ii), (1.1.2), (1.3.3), and (1,4.1)

- Established **only** in relation to that claimed land within the Witjira National Park that is the subject of the lease between the Minister for the Environment and Natural Resources and Irrwanyere Aboriginal Corporation, dated 5 October 1995:
  - (1.1.1), (1.2.1), (1.2.2),

As at least one of the rights and interests claimed are prima facie established the requirements of this provision have been met.

Result: Requirements met

S.190B(7)

Traditional physical connection:

The Registrar must be satisfied that at least one member of the native title claim group:

(a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or

(b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:

(i) the Crown in any capacity; or

(ii) a statutory authority of the Crown in any capacity; or

(iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

Reasons for the Decision

This section requires that I 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 covered by the application.

Traditional physical connection is not defined in the Native Title Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group.

In considering this condition I have had particular regard to the affidavits of five members of the native title claim group, **[name deleted]** (9 July 2002, 10 March 2003), **[name deleted]** (21 May 1999, 9 July 2002), **[name deleted]** (24 May 1999), **[name deleted]** (4 May 1999) and **[name deleted]** (28 July 2002). I have also had regard to the information contained in Schedules F, G and M of the application. The applicants depose in their affidavits that the information in the application is true. I am satisfied that a number of members of the native title claim group currently have and have had a traditional physical connection to parts of the claim area. I refer specifically to the information in the following affidavits of the above deponents:

- **[name deleted]** (9/7/2002), paras 5, 7, 9,11, 13, 14, 19;
- **[name deleted]** (10/3/03) paras 4, 5,11-17,26, 29
- **[name deleted]** (21/5/1999), paras 36, 38, 50;
- **[name deleted]** (9/7/2002), para 3;
- **[name deleted]** (24/5/1999), paras 18;
- **[name deleted]** (4/5/1999), paras 14, 15, 18, 22;
- **[name deleted]** (28/7/2002), paras 2, 5, 8, 10, 11.

I also note that two of the above deponents, **[name deleted]** and **[name deleted]**, reside at the Witjira National Park.

Based on the above information I am 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;

Result: Requirements met

S.190B(8)

No failure to comply with s.61A:

The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that because of s.61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made.

Reasons for the Decision

S.61A(1) – Native Title Determinations

A search of the National Native Title Register shows no approved determinations of native title for the area claimed in this application.

S.61A(2) - Previous exclusive possession acts

Areas affected by exclusive possession acts (s.23B) have been excluded from the area of the application by virtue of a provision to that effect in Attachment B. The application complies with s.61A(2).

S61A(3) - Previous non-exclusive possession acts

The applicants state at Schedule E that:
"The native title rights and interests claimed are also subject to the effect of:

- all existing non-native title rights and interests (see for example those referred to in Schedule D);
- all laws in South Australia made in accordance with ss.19, 22F, 23E or 23I of the *Native Title Act*;

to the extent that these are now valid and applicable."

The application therefore complies with s.61A(3).

S61A(4) - s.47, 47A 47B

The applicants state in Schedule L:

- " Witjira National Park is an area leased to Irrwanyere Aboriginal Corporation for the benefit of Aboriginal peoples and is occupied by members of the Eringa native title claim group.

- The applicants are not presently aware of any other land or waters within the claim area which conform with ss.47(1)(b) and 47A(1)(b) and (c) of the *Native Title Act*. The applicants assert that prior extinguishment of native title rights and interests in relation to any such land or waters should be disregarded in accordance with the provisions of either s.47 or s.47A of the *Native Title Act*.

- The applicants are not presently able to provide the particulars of "Vacant Crown Land" (if any) to which Paragraph 47B(1)(b) and (c) of the *Native Title Act* applies. The applicants assert that prior extinguishment of native title rights and interests in relation to any such land should be disregarded in accordance with provisions of s.47B of the *Native Title Act*."

Conclusion

I am required to ascertain whether this is an application that should not have been made because of the provisions of s.61A. There is nothing before me to indicate that this application should not have been made. I am satisfied the applicants' statements with respect to the provisions of that section are sufficient to meet the requirements of s 190B(8).

Result: Requirements met

S.190B(9)(a)

Ownership of minerals, petroleum or gas wholly owned by the Crown:

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

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

Reasons for the Decision

Schedule Q of the application states that:

"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."

Result: Requirements met

S.190B(9)(b)

Exclusive possession of an offshore place:

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

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

Reasons for the Decision

Not applicable. The application does not include any offshore place.

Result: Requirements met

S.190B(9)(c)

Other extinguishment:

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

(c) in any case – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2).

Reasons for the Decision

Under the requirements of this section, I must consider whether there are any native title rights and interests claimed by the applicants that have been otherwise extinguished.

In addition to the areas excluded from the claim area as considered in s.190B(8), I have listed, in my reasons for decision in relation to s.190B(4), the qualifications to the native title rights and interests claimed at Schedule E of the application.

The application does not disclose, and I am not otherwise aware of, any additional extinguishment of native title rights and interests in the area claimed.

Result: Requirements met

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