National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION COVER SHEET

REGISTRAR'S DELEGATE	Russell Trott
APPLICATION NAME	De Rose Hill
NAMES OF APPLICANTS	Peter De Rose, Owen Pannikan, Peter Tjutjatja, Johnny Wimitja De Rose, Michael Mitakiki, Pannikan Baker, **[name deleted]** (Deceased), Rini Kulyuru, Puna Yanima, Julie Tjami, Sadie Singer and Whiskey Tjukanku
NNTT NO. **FEDERAL COURT NO.**	SC94/2 SG6001/96
NNTT REGION	South Australia
DATE APPLICATION MADE	9 December 1994

I have considered the application against each of the conditions contained in ss 190B and 190C of the *Native Title Act* 1993.

DECISION

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

Written notice of the decision and the reasons for the decision, are to be provided to the Applicants.

1 December 2000

Russell Trott ***DATE***

Delegate of the Registrar pursuant to sections190, 190A, 190B, 190C, 190D.

Brief History of the application

The De Rose Hill native title determination (claimant) application was lodged with the National Native Title Tribunal on 9 December 1994 under the original *Native Title Act* 1993 (the "old Act") as in force prior to the amendments to it that were heralded by the commencement of the *Native Title Amendment Act* 1998 on 30 September 1998. The application was registered on 27 March 1995 and remains on the Register pending a registration test decision under s 190A of the *Native Title Act* 1993, as amended (the "new Act").

The external boundary of the application covers an area of approximately 1,865 square kilometres located in the north west of South Australia and traversing the Stuart Highway and Central Australian railway. The Aboriginal Legal Rights Movement represents the Applicants.

The Applicants' legal representatives have chosen to rely on the provision of additional information to the Registrar in relation to the claims made in the application without seeking to amend the application in the Federal Court. The Transitional Provisions to the *Native Title Amendment Act* 1998 apply. Schedule 5, Part 4, Item 11(8) of the Transitional Provisions relevantly provide that:

Later information to be taken into account

(8) In considering a claim in accordance with sub-items (3) to (7), the Registrar must: ….

(b) apply section 190A of the new Act as if the conditions in sections 190B and 190C requiring that the application:

(i) contain or be accompanied by certain information or other things; or
(ii) be certified or have other things done in relation to it;

also allowed the information or other things to be provided, or the certification or other things to be done, by the applicant or another person after the application is made.

(c) for the purposes of paragraphs (a) and (b) of this sub-item, advise the applicant that the Registrar is considering the claim, and allow the applicant a reasonable opportunity to provide any further information or other things, or to have any things done, in relation to the application.

I have taken the view that the effect of the Transitional Provisions outlined above is that I am obliged to treat additional information provided by the Applicants as though it had been contained in the application itself, to the extent that such information is not actually inconsistent with the information contained in the application and to the extent that such information qualifies, limits or more precisely defines the information contained in the application.

In considering the application for registration, I have therefore had regard to the following:

- Original application (Form 1) and accompanying documents lodged with the National Native Title Tribunal and referred to the Federal Court under s 74 of the old Act;

- Affidavits of each Applicant filed in the Federal Court on 30 May 2000;

- Methodology Report prepared by **[name deleted]** dated May 1996 concerning the claimants' authority to speak for the land;

- Outline of Facts and Contentions ("OOFC") filed in the Federal Court on 1 September 1997 in particularisation of the claim made in the application;

- Tenure documents filed in the Federal Court on 1 September 1997;

- Further Outline of Facts and Contentions ("FOOFC") filed in the Federal Court on 16 September 1998;

- Submissions by letter and attachments dated 17 February 2000 made on behalf of the Applicants in relation to the operation of sections 190B and 190C of the new Act;

- Opinion dated 16 June 2000 in relation to the provision of additional information;

- Response to opinion dated 27 June 2000 and submitted on behalf of the Applicants;

- Submissions from the State of South Australia dated 26 July 2000 concerning and in response to the additional information and submissions provided by the Applicants;

- Further submissions dated 4 August 2000 on behalf of the Applicants in response to the State's submissions.

For the sake of clarity, in considering this application, I have taken it to include the original application, lodged with the National Native Title Tribunal and referred to the Federal Court under s 74 of the old Act, together with the documents filed in the Federal Court in particularisation of the claim made in the application.

Other Information considered when making the Decision

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

- Registration Test File, Legal Services File and Federal Court Application File for native title application SC94/2.

- National Native Title Tribunal Geo-spatial Database

- Register of Native Title Claims

- Schedule of Native Title Claimant Applications

- Native Title Register

- Determination of Representative ATSI Bodies: their gazetted boundaries.

A. Procedural Conditions

190C2	***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 an affidavit or other document, required by sections 61 and 62.***

Reasons for the Decision

I set out as follows the reasoning in respect of each of the relevant sub-sections of sections 61 and 62 of the *Native Title Act*. On the basis of the application and accompanying documents, I am satisfied that the application meets the requirements of this condition.

Details required in section 61

61(3)	***Name and address for service of applicant(s)***

Reasons relating to this sub-section	The application **complies** with the sub-section
The application (Form 1, at A1 and A2) identifies the name and the address of each Applicant. The application (Form 1, at A3) identifies the Applicants' address for service. I am satisfied that the application complies with the procedural requirements of s 61(3).	

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

Reasons relating to this sub-section	The application **complies** with the sub-section

In considering whether the application complies with this condition, I must first be satisfied that the application has been made on behalf of a "native title claim group" that is a properly constituted group – not individuals or small sub-groups (*Risk v Registrar, NNTT* [2000] FCA 1589, at paras. 29-30). A native title claim group is not established or recognised merely because the group of people call themselves a native title claim group and I must be satisfied that the claimants truly constitute such a group. This includes the task of examining and deciding who, in accordance with traditional laws and customs, comprises the native title claim group (*Risk* (above), at para. 60). For the reasons set out in my reasons for decision in relation to the condition in s 190B(3) below, I am satisfied that the native title claim group is properly constituted by reference to the stated traditional laws and customs of the group and I refer to those reasons in relation to my view that the anterior aspects of the procedural requirements of s 61(4) are also met.

The application does not provide an exhaustive list of names of the persons in the native title claim group so the requirements of s 61(4)(a) are not met. The Applicants must therefore rely on satisfying s 61(4)(b).

I note that the State asserts that the various descriptions of the native title claim group are not sufficiently clear so that it can be ascertained whether any particular person is in the group. However, for the reasons set out in my reasons for decision in relation to the condition in s 190B(3) below, I have formed the view that the requirements of this condition are met and so refer to those reasons in relation to my view that the procedural requirements of s 61(4) are also met.

I am satisfied that the application has been made on behalf of a native title claim group that is a properly constituted group and that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is one of the persons in the claim group as is required by s 61(4)(b).

I am therefore satisfied there has been compliance with the procedural requirements of s 61(4).

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

Reasons relating to this sub-section	The application **complies** with the sub-section

s61(5)(a)

The application (Form 1) is not in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations* 1998. However, Regulation 5(1)(a) was not in operation when the application was lodged. The application (Form 1) is in the form prescribed by Regulation 5 of the *Native Title (Tribunal) Regulations* 1993. This Regulation has been repealed but was in operation when the application was lodged. In any event, it is my view that the application (Form 1) and documents filed in the Federal

Court in particularisation of the claim together substantially comply with the requirements set out in Regulation 5(1)(a).

s61(5)(b)

The application was lodged with the National Native Title Tribunal on 9 December 1994. As such, the transitional provisions apply. The relevant provisions are found in the table comprising Item 6 of Part 3 of Schedule 5 to the *Native Title Amendment Act* 1998. As the application was referred to the Federal Court under s 74 of the old Act, it is taken to have been made to the Federal Court and the Court is taken to have made an order under s 86C(1) of the new Act that mediation cease (Schedule 5, Part 3, Item 8). The term "application is taken to have been made to the Federal Court" is defined in Item 36 of Schedule 5 (see *Strickland v Native Title Registrar* [1999] FCA 1530, at para 35).

s61(5)(c)

It is my view that the application (in original form together with further documents filed in particularisation of the claim) complies with the requirements of s 61(5)(c) and contains all information as prescribed in s 62. I refer to my reasons in relation to s 62 below.

s61(5)(d)

The application is accompanied by prescribed documents, being:

- affidavits, as prescribed by s 62(1)(a), and
- details, as prescribed by s 62(1)(b).

I refer to my reasons for decision in relation to s62(1)(a) and (b) below. For the reasons outlined above, it is my view that the requirements of s61(5) are met.

I am satisfied there has been compliance with the procedural requirements of s61(5).

Details required in section 62(1)

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

Reasons relating to this sub-section	The application **complies** with the sub-section

Affidavits of identical content that were sworn by each Applicant before a qualified witness have been filed in the Federal Court.

It appears from the affidavits of **[name deleted]**, **[name deleted]** and **[name deleted]** that these deponents are illiterate. These affidavits do not include any certification pursuant to the requirements set out in Order 14, rule 3 of the *Federal Court Rules*. This issue was referred to the Aboriginal Legal Rights Movement (Applicants' representative) for comment. On 30 October 2000, a solicitor employed with the Aboriginal Legal Rights Movement and who has been involved in the conduct of this matter wrote to the Tribunal in the following terms:

*I confirm that **[name deleted]** (now deceased) and **[name deleted]** both swore affidavits dated 15 December 1998 before me at Ilintjatjarra, South Australia, for the purposes of section 62 Native Title Act 1993.*

The affidavits were sworn in the presence of a number of other claimants, including some of the named claimants. I read out and explained the contents of the affidavits to each of the named claimants separately, including the above-mentioned, with reference to the content of the material produced for the claim which had been the subject of a two day meeting which had immediately preceded the swearing of

the said affidavits.

In relation to ***[name deleted]*** *he was assisted by other claimants who, in language I took to be Yankunytjatjarra, repeated what I had read out and said by way of explanation before he acknowledged that he understood the contents of the affidavit, swore the affidavit and made his mark.*

I can therefore verify that I read the contents of each affidavit to each of the claimants both of whom seeme3d to understand the contents, and who preceded (sic) to 'sign' their affidavit by making their respective marks after swearing on a bible that the contents of the affidavit were true and correct to the best of their knowledge.

On 31 October 2000, a solicitor in the employ of Johnston Withers, Barristers and Solicitors, (who was engaged to assist the Applicants' representative and who has been involved in the conduct of this matter) wrote to the Tribunal concerning the affidavit of **[name deleted]** in the following terms:

I confirm that I attended on **[name deleted]** *in Amata, on the Pitjantjatjara lands in February of this year, at which time he swore and Affidavit in relation to the above matter.*

Prior to his swearing the Affidavit I explained to Mr Tjutjatja the nature and purpose of the Affidavit and read out its contents to him. I did this with the assistance of a person who translated what I was saying to Mr Tjutjatja.

I recall that I was satisfied that **[name deleted]** *seemed to understand the nature and contents of the Affidavit at the time he made his mark thereon.*

I accept the veracity of the statements that have been made by each solicitor in relation to these three affidavits. As noted above, all of the affidavits were filed in the Federal Court. On this basis, the statements that have been provided overcome any perceived or real shortcomings, notwithstanding any irregularities that may be present in relation to them.

The affidavits address the requirements of s 62(1)(a)(i) – (iv). The affidavits state the basis on which each Applicant is authorised as being in accordance with traditional laws and customs. I interpret this to mean that authorisation is in accordance with a process of decision-making pursuant to s 251B(a) and I am satisfied that the requirements of s 62(1)(a)(v) are also met.

I am satisfied there has been compliance with the procedural requirements of s 62(1)(a).

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

Comment on details provided	Information **provided**.
It is not a mandatory requirement that details of traditional physical connection be contained in the application. The Applicants' representative asserts by letter dated 17 February 2000 (at page 11 Paragraph 6) that "all of the named members of the claim group have a traditional physical connection with all or at least (in the case of each of them), part of the claim area. Particulars are provided in "OOFC" page 12, at paragraph 46 and Claimant Annexure Nos 3 to 13 and "FOOFC" Claimant Annexure Nos 3 to 37.	

Details required in section 62(2)

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

Reasons relating to this sub-section	The application **complies** with the sub-section
For the reasons set out in my reasons for decision in relation to the condition in s 190B (2), below, I am satisfied that the information and maps provided by the Applicants is sufficient to enable the area covered by the application to be identified with reasonable certainty.	

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

Reasons relating to this sub-section	The application **complies** with the sub-section
For the reasons set out in my reasons for decision in relation to the condition in s 190B (2), below, I am satisfied that the information in the application identifies the areas within the external boundary that are not covered by the application.	

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

Reasons relating to this sub-section	The application **complies** with the sub-section
The Applicants have provided maps in Appendix "A", of the original application. For the reasons set out in my reasons for decision in relation to the condition in s 190B (2), below, I am satisfied that the maps provided by the Applicants identify the boundaries of the area covered by the application.	

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-section	The application **complies** with the sub-section
The requirements of s62(2)(c) can be read widely to include all searches conducted by any person or body. However, I am of the view that under this condition I need only be informed of searches conducted by the Applicants in order to be satisfied that the application complies with this condition. It would be unreasonably onerous to expect applicants to have knowledge of, and obtain details about all searches carried out by every other person or body. Details of the searches of which the Applicants are aware are provided at Appendix B of the original application and with the tenure documents filed with the Federal Court of which copies have been provided to the Registrar by letter dated 17 February 2000.	

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

Reasons relating to this sub-section	The application **complies** with the sub-section
An adequate description of the native title rights and interests claimed by the Applicants are contained in the application (Form 1, at A9). The rights and interests claimed do not merely consist of a statement to the effect that the native title rights and interests that may exist or that have not been extinguished at common law. I have outlined these	

rights and interests claimed in my reasons for decision in relation to s 190B(4) below.

62(2)(e)(i)	***Factual basis – claim group has, and their predecessors had, an association with the area***

Reasons relating to this sub-section	The application **complies** with the sub-section
The applicants assert in "OOFC" and "FOOFC" in the application that they have, and their predecessors had, an association with the area. A factual basis for this assertion is provided in pages 4 to 25 "OOFC" and parts 4 and 8 "FOOFC" of the application. An assessment of the sufficiency of the factual basis provided by the Applicants is given with my reasons for decision in relation to s 190B (5) (a) and I refer to those reasons. I am satisfied that there is sufficient factual basis to support the assertion that the native title claim group has, and their predecessors had, an association with the area.	

62(2)(e)(ii)	***Factual basis – traditional laws and customs exist that give rise to the claimed native title***

Reasons relating to this sub-section	The application **complies** with the sub-section
The applicants assert in "OOFC" and "FOOFC" in the application that traditional laws and customs exist that give rise to the claimed native title. A factual basis for this assertion is provided in pages 4 to 25 "OOFC" and parts 4 and 8 "FOOFC" of the application. An assessment of the sufficiency of the factual basis provided by the Applicants is in my reasons for decision in relation to s 190B (5) (a) and I refer to those reasons. I am satisfied that there is sufficient factual basis to support the assertion.	

62(2)(e)(iii)	***Factual basis – claim group has continued to hold native title in accordance with traditional laws and customs***

Reasons relating to this sub-section	The application **complies** with the sub-section
The applicants assert in "OOFC" and "FOOFC" in the application that the claim group has continued to hold native title in accordance with traditional laws and customs. A factual basis for this assertion is provided in pages 4 to 25 "OOFC" and parts 4 and 8 "FOOFC" of the application. An assessment of the sufficiency of the factual basis provided by the Applicants is in my reasons for decision in relation to s 190B (5) (a) and I refer to those reasons. I am satisfied that there is sufficient factual basis to support the assertion.	

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-section	The application **complies** with the sub-section
In "OOFC" pages 19 to 25 and "FOOFC" Part 4, pages 61 to 65, the application provides details of activities in general terms that the native title claim group carries out in relation to the area claimed.	

In my view the description of activities is sufficient to comply with the requirements of s 62 (2) (f).

62(2)(g)	***Details of any other applications to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)***

Reasons relating to this sub-section	The application **complies** with the sub-section
A search conducted on the National Native Title Tribunal's Geo-spatial information system reveals that there are no overlapping applications.	

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-section	The application **complies** with the sub-section
A search conducted on the National Native Title Tribunal's Geo-spatial information system reveals that there have been no notices made under s 29 or any notices under the equivalent South Australian State legislation.	

190C3	***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

A search of the Register of Native Title Claims reveals that there are no overlapping applications.

As such, s 190C(3) has no operation in relation to the current application.

190C4(a) or 190C4(b)	***Certification and authorisation:*** ***The Registrar must be satisfied that either of the following is the case:*** ***(a) the application has been certified under Part II by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part; or*** ***Note: An application can be certified under section 203BE, or may have been certified under the former paragraph 202(4)(d).*** ***(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.***

Reasons for the Decision

This condition requires me to be satisfied that the application is certified pursuant to s 190C4(a) or authorised pursuant to s 190C4(b) of the Act. An application complies with s 190C(4)(a) if it is certified under s 203BE or was certified under repealed s 202(4)(d).

On 16 August 1999 the relevant Native Title Representative Body provided the Tribunal with a letter of certification pursuant to s 202(4)(d) and signed by Sydney Raymond Sparrow, Director, Aboriginal Legal Rights Movement Inc.

Certification by the Aboriginal Legal Rights Movement Inc.
There appears to be no legally required format for certification of a claimant application under former s 202(4)(d) other than it must be in writing and that it must contain the information required by former s 202(7). In my view the certificate provided complies with these requirements.

I am satisfied the application complies with s 190C(4)(a).

190C5	***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:*** • ***includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and*** • ***briefly sets out the grounds on which the Registrar should consider that it has been met.***

Reasons for the Decision

This requirement is not applicable, as I have found that the application meets the requirements of s 190C(4)(a). I refer to my reasons in relation to s 190C(4) above.

B. Merits Conditions

190B2	***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 or waters.***

Reasons for the Decision

In order for the application to meet the requirements of this section I must be satisfied that the information and map contained in the application, as required by s 62(2)(a) and s 62(2)(b), are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

Map

Two "maps" are provided with the original application. One is a copy of a portion of a map with a bold line marking the external boundary around the pastoral lease. This represents a schematic diagram of the application area rather than being a "map".

The second map shows in detail the pastoral lease boundaries and specific excluded areas as mentioned in the description. Coordinates are provided, however, no datum is referenced.

The Tribunal's Geospatial Unit has conducted an assessment of this information. I am guided by this assessment and I am satisfied that the map provides reasonable certainty of the area subject to the application and therefore meets the requirements of s62(2)(b).

Description

External boundary—

The description states that the application covers "the whole of the land and waters within the pastoral leases known as Agnes Creek, Paxton Bluff North and Paxton Bluff South". Crown lease numbers were provided as additional information. The Tribunal's Geospatial Unit has conducted an assessment of this information. I am guided by this assessment and I am satisfied that this description enables the external boundaries of the application to be identified and therefore meets the requirements of s62(2)(a)(i).

Internal boundary—

In "Attachment A, Areas within the External Boundary but excluded from the claim area" referred to at page 4 of the Applicants' submissions of 17th February 2000, the Applicants have provided information identifying the internal boundaries of the claimed area, and the areas excluded from the claim area as follows:

"Areas within the External Boundary but excluded from the claim area"
a)The road corridor where the claim area is transversed by the Stuart Highway;
b)The Railway corridor where the claim area is transversed by the Central Australian Railway (i.e.' Tarcoola to Alice Springs Railway), including the "Utah Bore ballast site";
c)The freehold land comprising Section 1258 Out of Hundreds (Alberga), Block (CT Vol.4394 Fol. 886);

and
d)Any area over which native title has been extinguished at common law or by statue, save and except for those areas of land or waters over which prior extinguishment may be disregarded in accordance with the provisions of either section 47, 47A or 47B of the Native Title Act 1993 (NTA).

In particular the following excluded:

- *Category A past acts, as defined in section 229 of the NTA, including any previous non-exclusive possession acts which are also a Category A past act; and*

- *Grants, vestings or" public works" which are "previous exclusive possession acts" (as defined in s.23B of the NTA) or "Category A intermediate period acts" (as defined in s.232B of the NTA) attributable to the Commonwealth and such grants, vestings or "public works" which are attributed to the State where and to the extent that the State has made provision –*

    - *in accordance with section 23E of the NTA to the same effects as sub-sections 23C, 23D and 23DA; or*
    - *in accordance with section 22F of the NTA to the same effects as sub-sections 22B and 22C.*

For the avoidance of doubt (but without limiting the generality of the foregoing), 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 possession acts", unless excluded from the definition by subsections 23B(9), (9A), (9B), (9C), or (10):

A. The creation or establishment of:
(1) a permanent "public work";
(2) a dedicated road;
(3) an act of adverse dominion where such an act was:

- *authorised by valid legislation; or*
- *authorised or required by the condition of valid Crown Grant, vesting or other interest;*
- *an unqualified grant of an estate in fee simple.*

B The grant of"
(1) a scheduled interest (see section 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;
(2) a residential lease on which a residence has been constructed in accordance with the terms and conditions of the lease (see section 249);
(3) a commercial lease on which permanent works or structures have been constructed in accordance with the terms and conditions of the lease (see section 246); and
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 section 249A).

In the response to opinion dated 27th June 2000, the Applicants submit that:

The description of the claim area set out in the application, together with the maps annexed, identify "with reasonable certainty" the land (and waters) over which native title rights and interests are claimed. The claim area is described in A6 of the application as comprising the land and waters within the three pastoral leases and as excluding the road and railway corridors and a small parcel of freehold land.

The excluded land did not in fact need to be specifically referred to, as the road and railway corridors and the freehold land do not form part of "the land and waters within the pastoral leases". The excluded land was however appropriately dealt with in the description.

"Attachment A" to the letter of 17th February 2000 then provided some further clarification in relation to the excluded land. However, there were in fact no areas referred to in Attachment A as being excluded from the claim area, which had not already been excluded by virtue of the description in A6 of the application. In particular, there are no "category A past acts" which were not already identified in the exceptions in the description in A6. Furthermore there have been no relevant "previous exclusive possession acts" or "category A intermediate period acts" attributable to the Commonwealth. Nor have there been any such acts attributable to the State either: (sic) South Australia has not yet enacted any legislation in accordance with Sections 22A or 23E of the Native Title Act.

An anterior issue concerns whether the information in Attachment A could be considered to be information that amends, rather than clarifies, what is contained in the application. Attachment A purports to clarify the information in the application but it is at least arguable that the introduction of classes of exemptions from the claim area could be said to be inconsistent with the original form of the application. It is however unnecessary for me to consider this issue further as the letter dated 27th June 2000 (outlined above) explains and addresses this issue to my satisfaction and I note that the State has not raised any contrary submissions on this point, nor does the State challenge the representative of the Applicants' understanding of the facts.

The State does however submit that the external fence line of De Rose Hill does not always coincide with the legal boundary. In some cases, as submitted by the State, the fence line includes land, which is not within the legal boundary and vice versa. For these reasons, the State submits that reasonable certainty is not apparent and the application does not comply with the requirements of the Act.

In reply to the above, the Applicants (in their submission dated 4th August 2000) claim that the State is not suggesting that the description does not meet the requirements of the Act. They agree that the fence line does not always coincide with the external boundary, but submit that it would be extraordinary to draw an inference from this that reasonable certainty of boundaries is not apparent. They further state that there is nothing in the original application, or the additional information provided under the Transitional Provisions, to suggest that the native title rights and interests claimed in the application relate to areas outside the legal boundary whether they are within, or outside of, the relevant fence lines.

In considering this issue, I note that the application does not state that the pastoral lease boundaries are defined by reference to the relevant fence lines. Contrary to the submission of the State, it is my view that the written and physical description of the claimed area is described with certainty. The only uncertainty that arises is whether there are any areas of the pastoral leases in which the relevant fence line does not enclose the legal boundary, or encroaches on other tenure. That issue is not an issue to be considered under this condition of the registration test. I note that the State has not suggested that there is any inconsistency between the map and the description.

For the above reasons, I am satisfied that the description in the application enables the internal boundaries of the application to be identified and therefore meets the requirements of s62(2)(a)(ii). In reaching this conclusion, I have proceeded on the basis that there is no evidence before me to indicate that native title has been extinguished by any of pastoral leases within the claim area. I have also proceeded on the basis that the decision in *State of Western Australia v Ward* [2000] FCA 191; FCA 611, concerning the effect on native title of certain Western Australian pastoral leases cannot be said to

apply to South Australian pastoral leases. That is an issue to be decided in another forum.

Conclusion

I am satisfied that the information and map contained in the application as required by paragraphs 62(2)(a) and (b) are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.

190B3	***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 of the registration test the description of the native title 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.

An exhaustive list of names of the persons in the native title claim group has not been provided so the requirements of s 190B(3)(a) are not met. Alternatively, s 190B(3)(b) requires the Registrar 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.

However, I must first be satisfied that the application has been made on behalf of a "native title claim group" that is a properly constituted group – not individuals or small sub-groups (*Risk v Registrar, NNTT* [2000] FCA 1589, at paras. 29-30). A native title claim group is not established or recognised merely because the group of people call themselves a native title claim group and I must be satisfied that the claimants truly constitute such a group. This includes the task of examining and deciding who, in accordance with traditional laws and customs, comprises the native title claim group (*Risk* (above), at para. 60). It is abundantly clear to me, from the materials referred to below, that the application has been made on behalf of a native title claim group that is a properly constituted group. In forming this view I have taken into account the fact that there are no overlapping claims and I also refer to my reasons for decision in relation to the condition in s 190B(5), below.

I note that the State asserts that the description of the native title claim group is not sufficiently clear so that it can be ascertained whether any particular person is in the group.

The Application (Form 1, at A5) describes the native title claim group as follows:

The application is made:

- *on behalf of the applicants and others as claimants, as follows:*

Those other Aboriginal persons acknowledged in accordance with traditional laws and customs to be the owners of the claim area predominantly through historical, spiritual and ancestral relationship to the land.

By letter dated 13 December 1994, the Applicants' representative advised that, for the purposes of the Schedule of Claims, the claimant group can be described as:

Those Yankunytjatjara people who have historical, spiritual and ancestral relationship to the claim area. (The application is not being made on behalf of the whole of the Yankunytjatjara people…)

By letter dated 17 February 2000, the Applicants' representative purported to provide further information in relation to the application within the meaning of Item 11(8) in Part 4 of Schedule 5 of the Transitional Provisions.

The original application and the letter of 17th February 2000 define the claim group as comprising:

- certain named individuals, and
- their biological descendants.

Attachment B in the letter of the letter of 17th February 2000 also sets out the principles of incorporation by adoption into the group according to traditional law and custom.

The letter of 17th February 2000 also provides additional information on the system of rules governing the transmission and acquisition of common or group rights and interests in accordance with traditional laws and customs that apply in relation to the claim area. The letter points out that this is also further explained in "OOFC" at para 29 and in "FOOFC" at paras 130 to 187. In summary, those who hold the group or common rights and interests in relation to the claim area are known as its *nguraritja* the membership of which is provided in detail. In the letter of 17th February 2000 it is submitted on behalf of the Applicants that para 291 of the "FOOFC" amplifies upon rather than derogates from the nature of the tenure and responsibilities of nguraritja as the holders of common or group rights. In the letter of 17th February 2000 it is also submitted on behalf of the Applicants that the reference in "FOOFC" at paras 163-164 to *ngura walytja* embraces a wider group than the term nguraritja but includes all nguraritja within it. It is submitted that ngura walytja who are not nguraritja do not hold the body of rights and interests held by the nguraritja and accordingly are not included as members of the native title claim group.

In the response to opinion dated 27th June 2000, it is further submitted for the Applicants that it is apparent from the application that the claim is being made on behalf of the Applicants and "those other Aboriginal persons acknowledged in accordance with traditional laws and customs to be owners of the claim area" and that the information provided on 17th February 2000 provides a more precise description of such persons. As such, it is submitted that the information clarifies who such persons are in a manner consistent with the Transitional Provisions, for the purposes of satisfying this condition of the registration test.

Where such information is not inconsistent with the claim made in the application, I must have regard to such information. I note that the State submits that the various descriptions of the native title claim group in the information that has been provided (Methodology Report prepared by **[name deleted]**, "OOFC", "FOOFC", and Submissions by letter dated 17th February 2000) are inconsistent with each other and do not describe the group sufficiently clearly so that it can be ascertained whether any particular person is in the group. The State further submits that if the intention of the Applicants is to amend the claim group description then the application ought to be amended by leave of the Federal Court.

By letter dated 4th August 2000 the Applicants' representative has responded to the State's submissions and contends that there is in fact no inconsistency between the

information provided on 17th February 2000 and the application, nor is there any inconsistency between that information and the various descriptions of the claim group or details of some of its members. It is however conceded that in the submission of the Applicants dated 17th February 2000 the membership of the claim group could perhaps be better expressed (and in any event inferred to be) as follows:

The members of the claim group accordingly comprise all of the nguraritja named above together with their biological and adoptive descendants as referred to above.

As to whether the description of the claim group meets the requirements of the Act, I note that the correct administrative test requires a description by way of a set of rules or principles for the ascertainment of group members (*Ward v Registrar, NNTT* [1999] FCA 1732 per Carr J. at para 25). One of the methods through which this may be achieved could be to describe the people who belong to the group according to its traditional laws and customs. The group description in the application is very broad but that does not mean that it is inconsistent with the equally broad description in the original application. I accept that the additional information clarifies (and is not inconsistent with) what is claimed in the application.

In my view the group description that is provided in the original application is supplemented by the additional information, some of which has been filed in the Federal Court in particularisation of the claim and must therefore be considered part of the application in any event. As such I am bound to consider the additional information. The "additional" information and particularisation of the application together provide for it to be ascertained, using objective criteria, whether any particular person is a member of the native title claim group by reference to the membership of the nguraritja, together with their biological and adoptive descendants.

The fact that all members of the claim group comprise all of the nguraritja named together with their biological and adoptive descendants means that it should be possible to identify whether any given person or any of their descendants, whether biological or adoptive, is a member of the native title claim group. Further, I am satisfied that there is a set of rules, embodied in the traditional laws and customs of the native title claim group, that can be objectively referred to in order to determine whether a person has been incorporated into the native title claim group. Whilst it might be preferable (and more convenient) for the Applicants to seek leave to amend the application it is unnecessary, in my view, to do so in order to comply with this condition of the registration test as the additional information provided for the purposes of the registration test clarifies that the application complies with the requirements of this condition.

It is my view, contrary to the submission of the State, that the application and information provided under the Transitional Provisions is sufficient for it to be ascertained, using the criteria of membership of the nguraritja including biological and adoptive descent (which can be objectively verified), whether any particular person is a member of the native title claim group.

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

I am satisfied that the application complies with s 190B(3).

190B4	*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 be readily identified.***

Reasons for the Decision

This condition requires me to be satisfied that the native title rights and interests claimed can be readily identified. It is insufficient to merely state that these native title rights and interests are 'all native title interests that may exist, or that have not been extinguished at law'. To meet the requirements of s 190B (4), I need only be satisfied that at least one of the rights and interests sought is sufficiently described for it to be readily identified.

The native title interests are set out in the original application at A9 paragraph 2(i) to (xv). The native title rights and interests claimed in the application are the rights and interests of common law holders of native title derived from and exercisable by reason of the existence of native title, in particular:

i. possession, occupation, use and enjoyment of the land,
ii. to hunt on the land (fauna),
iii. to collect food from the land (flora),
iv. to collect timber, stones, ochre, resin,
v. to collect water from the land,
vi. to conduct religious activities on and concerning the land,
vii. to care for sites,
viii. to hold meetings on the land in accordance with Aboriginal tradition,
ix. to care for the land in accordance with spiritual obligations,
x. to otherwise care for the land in accordance with their and custom,
xi. to go anywhere on the land, subject to religious avoidance of certain areas,
xii. to camp on the land (including the erection of shelters),
xiii. to practice cultural beliefs concerning births and deaths (including attendance at funerals) on the land,
xiv. to learn, hold, and transmit to younger generations geographical, ritual, and spiritual rights and knowledge of sites and country,
xv. to regulate others in relation to doing any of these things.

The original application (Form 1 at A9, para 3) states that the native title rights and interests claimed are also subject to the effect ofall existing non-native title rights and interests.

The submissions made by letter and attachments dated 17th February 2000, state at page 6, invite the Registrar,

to consider the generic aspects of these rights and interests…….in order to clarify the intended ambit of these rights and interests as follows:

(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 the others.*

The letter dated 17th February 2000 further invites the Registrar, at page 7,

to consider the native rights and interests that flow from these. They include:

3.1 Occupation and Economic

(a)the right to access and occupy the claim area, including to live on, camp and erect dwellings on the land;

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

(c)the right to make a living and derive economic benefit from the claim area, including to dispose of the resources of the claim area by commerce or exchange (and products therefrom.);

(d)the right to share of the benefit of resources taken on the claim area by others;

3.2 Control and Management

(e)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;

(f)The right to control access, occupation, use and enjoyment of the claim area and its resources by others;

3.3 *Cultural*

(g)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);

(h)The right to maintain, manage develop, transmit, and prevent dissemination and misuse of cultural and ritual knowledge relating to the claim area;

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

3.4 *Membership*

(j)The right to determine, in accordance with traditional law and custom, the persons to whom native title rights and interests in the claim area are or have been transmitted.

The Applicants' response to opinion dated 27th June 2000, however, draws a distinction between the above and the native title rights and interests claimed in the original application.

The State submits that the application should be amended to include the interests and rights set out in the letter dated 17th February 2000 (and that the rights and interests claimed at A9.2(xiv)-(xv) ought to be deleted from the amended application). As to the need to amend the application, I agree with the submission of the State. As the application has not been amended I may only consider those rights and interests that are claimed in the original application (Form 1, at A9.2)

In considering whether the application complies with this condition, I have therefore taken the rights and interests referred to in the original application (Form 1 at A9) to be the rights and interests claimed. I have not had regard to the rights and interests that are purported to flow from what is claimed in the application that are referred to in the submissions and additional information dated 17th February and 27th June 2000.

By particularising the rights and interests claimed into a list specific rights and interests which are comprehensible, I consider the rights and interests identified by the Applicants to be clearly defined and therefore readily identifiable.

As noted above, the original application (Form 1 at A9, para 3) states that the native title rights and interests claimed are also subject to the effect of all existing non-native title rights and interests. For the reasons set out in my reasons for decision in relation to s190 B(8) and s 190 B(9)(a) below, I am satisfied that this qualification to the rights and interests claimed is sufficient to allow the particular native title rights and interests claimed to be readily identified in the particular circumstances in which this application is presently before me for consideration.

I am satisfied that the application complies with s 190B(4).

190B5	***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

This condition requires me to be satisfied that the factual basis on which it is asserted that there exist native title rights and interests as claimed in the application is sufficient to support the assertion.

I am of the view, given the beneficial nature of the new Act, that so long as there is a sufficient factual basis, this is adequate.

There are three criteria to consider in determining over all whether or not I am satisfied that there is a sufficient factual basis to support the Applicants' assertion about the existence of the native title rights and interests listed at paragraph A 9 of the original application.

<u>190B(5)(a) – that the native title claim group have, and the predecessors of those persons had, an association with the area</u>

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

In considering this condition, I have had regard to "OOFC" pages 4 to 30, Annexure 1, Genealogy 1, Annexure2, Genealogy 2 and Annexures 3 to 13, and also "FOOFC" part 4, pages 1 to 46, pages 61 to 65, part 7 Annexures 1 to 37, and part 8, pages 1 to 87. It is clear that the native title claim group have an association with the claim area and are the descendants of some members of the native title claim antecedent group who also had an association with the claim area:

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

This subsection requires me to be satisfied that traditional laws and customs exist; that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to native title rights and interests.

I have had regard to "OOFC" pages 4 to 30, Annexure 1, Genealogy 1, Annexure 2, Genealogy 2 and Annexures 3 to 13 and "FOOFC" section 4, pages 2 to 48, pages 51 to 55, pages 61 to 65, pages 66 to 71.

On the basis of this information 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.

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

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

I have already referred to information relevant to this sub-section, above. I will not repeat that information here. For the reasons set out in 190B(5)(a) and (b) and having regard to the same material I am satisfied that there is a factual basis for the claim group continuing to hold native title in accordance with those traditional laws and customs.

I am satisfied that the application complies with the requirements of s 190B(5).

190B6	*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 rights and interests claimed can be established.

'Native title rights and interests' are defined at s 223 of the Act. This definition specifically attaches native title rights and interests to land and water, and in summary requires:
the rights and interests to be linked to traditional laws and customs;
those claiming the rights and interests to have a connection with the relevant land and waters; and
those rights and interests to be recognised under the common law of Australia.

This definition is closely aligned with all the issues I have already considered in relation to s 190B (5). I will draw on the conclusions I made under that section in my consideration of the application under this condition of the registration test.

The term 'prima facie' was considered in North Ganalanja Aboriginal Corporation v Qld 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted: "The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie" is: "At first sight, on the face of it; as appears at first sight without investigation." [Citing the Oxford English Dictionary (2nd ed 1989)].

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

The native title interests are set out in the original application at A9 paragraph 2(i) to (xv). The native title rights and interests claimed in the application are the rights and interests of common law holders of native title derived from and exercisable by reason of the existence of native title, in particular:

i. possession, occupation, use and enjoyment of the land,
ii. to hunt on the land (fauna),
iii. to collect food from the land (flora),
iv. to collect timber, stones, ochre, resin,
v. to collect water from the land,
vi. to conduct religious activities on and concerning the land,
vii. to care for sites,
viii. to hold meetings on the land in accordance with Aboriginal tradition,
ix. to care for the land in accordance with spiritual obligations,
x. to otherwise care for the land in accordance with their and custom,
xi. to go anywhere on the land, subject to religious avoidance of certain areas,
xii. to camp on the land (including the erection of shelters),
xiii. to practice cultural beliefs concerning births and deaths (including attendance at funerals) on the land,
xiv. to learn, hold, and transmit to younger generations geographical, ritual, and spiritual rights and knowledge of sites and country,

xv. to regulate others in relation to doing any of these things.

For the reasons set out in my reasons for decision in relation to s 190B(4), above, in considering whether the application complies with this condition, I have taken the rights and interests referred to in the original application (Form 1 at A9) to be the rights and interests claimed. I have not had regard to the rights and interests that are purported to flow from what is claimed in the application that are referred to in the submissions and additional information dated 17th February and 27th June 2000.

As to prima facie material, I have had particular regard to "OOFC", Sections 8 (b), (g), and (e), and "FOOFC", Section 4, pages 1 to 71. Those documents provide comprehensive material and information sufficient to show that on a prima facie basis, the native title rights and interests claimed are capable of being made out. It is however necessary to consider which of the 15 rights and interests claimed in the application are capable of being established at law and which are therefore (in light of the prima facie material provided) capable of being registered.

I note that the State makes no comment in relation to this condition of the registration test.

The Federal Court in *State of Western Australia v Ward* [2000] FCA 191; FCA 611, (*Ward*) found, by majority, that the common law only recognises and protects native title rights and interests that involve a physical presence on the land and activities on the land associated with traditional social and cultural practices. Their Honours found that common law recognition and protection was only available in relation to "...the physical enjoyment of rights and interests that are of a kind that can be exercised on land." The majority held that the common law does not protect purely spiritual or religious relationships with land. Therefore, the majority held that a determination of native title under the Act must also be confined to those types of rights and interests. The majority acknowledged that spiritual, religious and cultural rights were relevant to proving the connection required to establish native title but found these rights could not be recognised, per se, in a determination of native title. It is arguable that these rights can be made out, prima facie, in that they go to proving connection. However, because rights of this kind will not form part of a determination, the better view appears to be that they also should not be registered. This is because it is difficult to justify claimants having a right to negotiate in relation to rights that are not recognised as part of a determination of native title under Australian law.

In my view the rights and interests claimed at A9.2(i)-(xiii) are capable of being recognised at law. In my view (and in spite of the submission from the Applicants dated 4th August 2000) this is also the case for the right claimed at A9.2(xiv). It is not a right that is expressed as a purely spiritual or religious relationship with land. It is expressed in such a way that the exercise of the right would occasion a physical presence on the subject land. In my view it is therefore capable at law of being made out and there is nothing before me that would seem to indicate that it is cannot, prima facie, be registered.

Taking account of *Ward* I accept the parties' submissions and am of the view that the native title right claimed at A9.2(xv) is not capable of being recognised by the common law of Australia and is therefore not registrable.

I am therefore satisfied that the following rights and interests, prima facie, can be established (subject to the effect of all existing non-native title rights and interests) :

i. possession, occupation, use and enjoyment of the land,
ii. to hunt on the land (fauna),
iii. to collect food from the land (flora),
iv. to collect timber, stones, ochre, resin,
v. to collect water from the land,
vi. to conduct religious activities on and concerning the land,
vii. to care for sites,
viii. to hold meetings on the land in accordance with Aboriginal tradition,
ix. to care for the land in accordance with spiritual obligations,
x. to otherwise care for the land in accordance with their and custom,
xi. to go anywhere on the land, subject to religious avoidance of certain areas,
xii. to camp on the land (including the erection of shelters),
xiii. to practice cultural beliefs concerning births and deaths (including attendance at funerals) on the land,
xiv. to learn, hold, and transmit to younger generations geographical, ritual, and
spiritual rights and knowledge of sites and country.

I am satisfied that the application complies with s 190B(6).

190B7	***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 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 holder of a lease.***

Reasons for the Decision

This condition of the registration test requires me to be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

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

For the reasons set out in my reasons for decision in relation to the condition in s 190B (5) I am satisfied that there exist traditional laws and customs observed by the claim group sufficient to support traditional physical connection.

I have considered the material provided in "OOFC" at paragraph 46, and Claimant Annexures numbers 3 to 13, and "FOOFC" Claimant Annexures numbers 3 to 37. I am satisfied that a number of members of the native title claim group currently have and have had traditional physical connection to parts of the claim area.

I am satisfied that the application complies with s 190B (7).

190B8	***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

For the reasons that follow I have formed the conclusion that the application complies with s 61A and that the provisions of this section are met.

S61A(1) – Native Title Determination

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

S61A(2) – Previous Exclusive Possession Acts

"Attachment A," and the final sentence in point 1 of the letter of 17th February 2000 from by the Applicants' representative state that the application does not include any lands subject to a Category A past act (as defined in s 229) or a previous exclusive possession act as defined under s 23B of the Act save where the Act allows those lands to be part of a native title determination application. The application itself does not address this requirement.

However, it is unnecessary for me to deal with this issue and decide whether there is any inconsistency. This is because, as paragraphs 2 and 4 of the Applicants' Response to opinion, dated 27 June 2000 point out, there have not been any "previous exclusive possession acts" attributable to the Commonwealth within the claim area. This fact is not disputed by the State. The Applicants' Response of 27 June 2000 also points out that there have not been any acts attributable to the State of South Australia by virtue of any State legislation that might have made provision for such acts as mentioned in s 23E of the new Act. This is also not in dispute. It is my understanding, as of the date of this decision, that the Parliament of South Australia has not enacted legislation for such a purpose.

Accordingly there has been no failure to comply with s 61A.

S61A(3) – Previous Non-Exclusive Possession Acts

Paragraph A9, point 3 of the original application, and paragraph 8, dot point 1 of the Applicants' submissions dated 17th February 2000 state that the native title rights and interests claimed are also subject to the effect of:

- all existing non – native title rights and interests; and
- all previous non exclusive possession acts (see 190B4), and
- all laws in South Australia made in accordance with sections 19, 22F, 23E or 23I of the Native Title Act 1993;

to the extent these are valid and applicable.

The application itself does not address this requirement.

However, it is unnecessary for me to deal with this issue and decide whether there is any inconsistency. This is because, as paragraphs 2 and 4 of the Applicants' Response to opinion, dated 27 June 2000 point out, there have not been any "previous non-exclusive possession acts" within the claim area. This fact is not disputed by the State.

Accordingly there has been no failure to comply with s 61A.

Conclusion

For the reasons identified above, the application and accompanying documents do not

disclose and it is not otherwise apparent that because of s 61A the application should not have been made.

The application complies with s 190B (8).

190B9(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 right of the Common-wealth, a State or Territory wholly owns the minerals, petroleum or gas;***

Reasons for the Decision

At paragraph A9.2 of the original application, and pages 28 to 30 of "OOFC", the Applicants have asserted a right to natural resources – including the right to take, use, enjoy and develop the natural resources of the claim area, and the right to control the use and enjoyment of others of natural resources of the area.

At point 3, page 11, paragraph 2, and again at point 8, dot point 2 of the submissions dated 17th February 2000, the Applicants state that no claim is being made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by the Crown under the valid laws of the Commonwealth or State. Indeed, no such assertion of ownership is made in the application.

The State submits that any concerns about whether the application infringes this condition are alleviated by the provision of the additional information. However, the State's submission is that the additional information appears to amend rather than clarify the information contained in the application and that the Applicants ought to seek leave to amend the application accordingly.

The submission of the Applicants is that the additional information does not contradict anything in the application and clarifies what is claimed in the application so that it is clear that no claim is being made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by the Crown under the valid laws of the Commonwealth or State.

I accept the submission of the Applicants. In my view, it is abundantly clear that no claim is being made such that the provisions of this condition would not be capable of being met. Whilst it might be preferable (and more convenient) for the Applicants to seek leave to amend the application it is unnecessary, in my view, to do so as the additional information provided for the purposes of the registration test clarifies that the application complies with the requirements of s 190B(9)(a).

190B9(b)	***Exclusive possession of an offshore place:*** ***The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:*** ***(b) to the extent that the native title rights and interests claimed relate to waters in an offshore place - those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place;***

Reasons for the Decision

The area claimed in the application does not include any offshore place.

The application complies with s 190B (9) (b).

190B9(c)	***Other extinguishment:*** ***The application and accompanying documents must not disclose, and the Registrar must not otherwise be aware, that:*** ***(c) in any case - the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2), 47A(2) or 47B(2)).***

Reasons for the Decision

The application and accompanying documents do not disclose, and I am not otherwise aware of, any area where an extinguishing act has occurred and yet the application seeks to claim native title rights and interests over such an area.

The application complies with s 190B (9) (c).