FEDERAL COURT OF AUSTRALIA

King on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v State of South Australia [2011] FCA 1387

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| Citation: | King on behalf of the Eringa Native Title Claim Group and the Eringa No 2 Native Title Claim Group v State of South Australia [2011] FCA 1387 |
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| Parties: | **EDIE KING, RUTH MCKENZIE, EMILY CHURCHILL, HOWARD DOOLAN, DEAN AH CHEE AND MARILYN HULL ON BEHALF OF THE ERINGA NATIVE TITLE CLAIM GROUP AND THE ERINGA NO 2 NATIVE TITLE CLAIM GROUP v THE STATE OF SOUTH AUSTRALIA AND OTHERS****LINDA CROMBIE, BRENDA SHIELDS, SHARON LUCAS, HAYDYN BROMLEY, ARTHUR AH CHEE ON BEHALF OF THE WANGKANGURRU/YARLUYANDI NATIVE TITLE CLAIM GROUP v THE STATE OF SOUTH AUSTRALIA AND OTHERS** |
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| File numbers: | SAD 6010 of 1998SAD 6016 of 1998 SAD 6002 of 1999  |
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| Judge: |  |
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| Date of judgment: | 13 December 2011 |
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| Catchwords: | **NATIVE TITLE** – consent determination – conditions prescribed by s 87A of the *Native Title Act 1993* (Cth) satisfied – resolution by agreement of claims for determination of native title  |
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| Legislation: | *Native Title Act 1993* (Cth)*Native Title Amendment Act 1998* (Cth)  |
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| Cases cited: | *Barunga v State of Western Australia* [2011] FCA 518*Campbell v Northern Territory of Australia* [2011] FCA 580*Carlton v Northern Territory of Australia* [2011] FCA 576*Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588*De Rose v State of South Australia (No 2)* [2005] FCAFC 110 *Eringa, Eringa No 2, Wangkangurru/Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v The State of South Australia* [2008] FCA 1370*Goonack v State of Western Australia* [2011] FCA 516*Jones v Northern Territory of Australia* [2011] FCA 573*Jungarrayi on behalf of the Mirtartu, Warupunju, Arrawajin and Tijampara Landholding Groups v Northern Territory of Australia* [2011] FCA 766*King v Northern Territory of Australia* [2011] FCA 582*Kngwarraye on behalf of the members of the Arnerre, Wake-Akwerlpe, Errene and Ileyarne Landholding Groups v Northern Territory of Australia* [2011] FCA 765*Kngwarrey on behalf of the members of the Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/Amatyerr and Areyn Landholding Groups v Northern Territory of Australia* [2011] FCA 428*Long v Northern Territory of Australia* [2011] FCA 571*Lota Warria (on behalf of the Poruma and Masig Peoples) v Queensland* (2005) 223 ALR 62*Lovett* *on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474*Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422*Munn (for and on behalf of the Guggari People) v The State of Queensland* (2001) 115 FCR 109*Nelson v Northern Territory of Australia* (2010) 190 FCR 344*Paddy v Northern Territory of Australia* [2011] FCA 574*Risk v Northern Territory* [2006] FCA 404*Rosewood v Northern Territory of Australia* [2011] FCA 572*Simon v Northern Territory of Australia* [2011] FCA 575*Smith v State of Western Australia* (2000) 104 FCR 494*Wavehill v Northern Territory of Australia* [2011] FCA 584*Wavehill v Northern Territory of Australia* [2011] FCA 581*Western Australia v Ward* (2002) 213 CLR 1*Young v Northern Territory of Australia* [2011] FCA 583*Young v Northern Territory of Australia* [2011] FCA 585 |
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| Date of hearing: | 13 December 2011 |
|  |  |
| Date of last submissions: | 29 November 2011 |
|  |  |
| Place: | Bloods Creek |
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| Division: |  |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 69 |
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| Counsel for the Applicants in SAD 6010 of 1998: | The applicant in SAD 6010 of 1998 did not appear. |
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| Counsel for the Applicants in SAD 6016 of 1998 and SAD 6002 of 1999: | S Kenny |
|  |  |
| Solicitor for the Applicants in SAD 6016 of 1998 and SAD 6002 of 1999: | Camatta Lempens |
|  |  |
| Counsel for the State of South Australia: | A Shackley and S Carlton |
|  |  |
| Solicitor for the State of South Australia: | Crown Solicitors’ Office |
|  |  |
| Counsel for South Australian Native Title Services Ltd: | A Beckworth |
|  |  |
| Solicitor for South Australian Native Title Services Ltd | South Australian Native Title Services Ltd |
|  |  |
| Counsel for Telstra Corporation Limited: | C Lawrence |
|  |  |
| Solicitor for Telstra Corporation Limited: | Blake Dawson |
|  |  |
| Counsel for Scorpion Exploration Pty Ltd: | K Bickford |
|  |  |
| Solicitor for Scorpion Exploration Pty Ltd: | McDonald Steed McGrath |
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| Counsel for the Pastoralists: | R Craddock |
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| Solicitor for the Pastoralists: | Rosemary H Craddock |

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| IN THE FEDERAL COURT OF AUSTRALIA |  |
| SOUTH AUSTRALIA DISTRICT REGISTRY |  |
| GENERAL DIVISION | SAD 6010 of 1998SAD 6016 of 1998SAD 6002 of 1999 |

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| BETWEEN: | EDIE KING, RUTH MCKENZIE, EMILY CHURCHILL, HOWARD DOOLAN, DEAN AH CHEE AND MARILYN HULL ON BEHALF OF THE ERINGA NATIVE TITLE CLAIM GROUP AND THE ERINGA NO 2 NATIVE TITLE CLAIM GROUPEringa ApplicantLINDA CROMBIE, BRENDA SHIELDS, SHARON LUCAS, HAYDYN BROMLEY, ARTHUR AH CHEE ON BEHALF OF THE WANGKANGURRU/YARLUYANDI NATIVE TITLE CLAIM GROUPWangkangurru/Yarluyandi Applicant |
| AND: | THE STATE OF SOUTH AUSTRALIA AND OTHERSRespondents |

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| JUDGE: | KEANE cJ |
| DATE OF ORDER: | 13 DECEMBER 2011 |
| WHERE MADE: | bloods creek |

**THE COURT NOTES THAT:**

A. The Eringa Applicant first lodged Native Title Determination Application (No. SAD 6010 of 1998) (the Eringa #1 Application) with the National Native Title Tribunal on 13 March 1996 in relation to lands and waters in northern South Australia. The Eringa #1 Application was referred to the Federal Court on 30 September 1998 and, to the extent that it covered part of the area of the Witjira National Park (being a portion of the claim area), was the subject of approved determinations of native title dated 11 September 2008 (the *Witjira Determinations*). The Eringa #1 Application was amended on 21 January 2011 including, in particular, by the withdrawal of its western boundary to avoid an overlap with the new Tjayiwara/Unmuru Native Title Determination Application (No. SAD 208 of 2010).

B. A second Eringa Native Title Determination Application (No. SAD 6002 of 1999) was first lodged with this Court on 26 May 1999 (the Eringa #2 Application) in relation to land and waters to the east of the Eringa #1 Application area. The Eringa Application #2, to the extent that it covered part of the area of the Witjira National Park (being a portion of the claim area), was the subject of the *Witjira Determinations*. The Eringa #2 Application was amended on 21 January 2011.

C. The Wangkangurru/Yarluyandi Applicant first lodged Native Title Determination Application (No. SAD 6016 of 1998) with this Court on 21 August 1997 (the Wangkangurru/Yarluyandi Application) in relation to land and waters in northern South Australia and south-western Queensland. The Wangkangurru/Yarluyandi Application was referred to the Federal Court on 30 September 1998 and, to the extent that it covered the area of the Witjira National Park (being a portion of the claim area), was the subject of the *Witjira Determinations*. The Wangkangurru/Yarluyandi Application was amended on 8 October 2009, including, in particular, by the withdrawal of any claim to native title rights and interests in relation to land and waters to the west of the Witjira National Park.

D. The Applicants for the Eringa #1 Application, the Eringa #2 Application and the Wangkangurru/Yarluyandi Application have filed with this Court, pursuant to s 87A(2) of the *Native Title Act 1993* (Cth) (the Native Title Act), an agreement in writing to seek the making of consent orders for a determination over those parts of the amended Wangkangurru/Yarluyandi Application that continue to be overlapped by either the Eringa #1 Application or the Eringa #2 Application.

E. The parties acknowledge that the effect of the making of the determination will be that members of the Eringa native title claim group and members of the Wangkangurru/Yarluyandi native title claim group, in accordance with the respective traditional laws acknowledged and the traditional customs observed by them, will be recognised as the Native Title Holders for the Determination Area as defined by Paragraph 2 of this Order.

F. The parties have requested that the Court determine the proceedings without a trial.

Being satisfied that a determination in the terms sought by the parties would be within the power of the Court, and it appearing to the Court appropriate to do so and by the consent of the parties:

**THE COURT ORDERS, DECLARES AND DETERMINES BY CONSENT THAT:**

**Interpretation & Declaration**

1. In this determination, including its Schedules, unless the contrary intention appears, the words and expressions used have the same meaning as they are given in Pt 15 of the Native Title Act.

2. In this determination, “the Determination Area” means the area described in Schedule 1 (as shown in the Map comprising Schedule 2 hereto), apart from those excluded areas which are described or referred to in Paragraph 10 and Schedule 3.

3. In this determination, including its schedules, in the event of an inconsistency between a description of an area in a schedule and the depiction of that area on the Map in Schedule 2, the written description shall prevail.

4. Native title exists in the areas described in Schedule 1 with the exception of those areas described or referred to in Paragraph 10 and Schedule 3.

**Native Title Holders**

5. The Native Title Holders are those Lower Southern Arrernte, Luritja/Yankunytjatjara and Wangkangurru persons who have a traditional connection to the Determination Area, being those of:

* the descendants of Wiljali
* the descendants of Yungili and Yungili’s brother and their wives, being the sisters of Maggie and Bugagaguna
* the descendants of Opossum (including Billy Ngaltagintata Reese)
* the descendants of the sibling pair Nguramariu (male) and Pungatjuntu (female)
* the descendants of the siblings Iljili–Banggana and Iljili-Birbana
* the descendants of the siblings Ruby and Elsie Girranungada Nancurda
* the descendants of Willy Doolan
* the descendants of Lalayi
* the descendants of Jimmy Arrerte
* the descendants of Lilly Summerfield (Summerville)
* Marilyn Rose Hull Ah Chee and all of her descendants
* Ian Hodgson and all of his descendants
* the descendants of Angeline (including Ruth McKenzie, Tom Cramp and Jenny Stewart)
* All of the descendants of Mary Cleanskin (Nyukapinya) (including Billy Bailes and June Bailes)
* the descendants of Anatjari and Wiltiwa (the parents of Lilly, the Arrernte mother of Edie King)
* the descendants of Harry Taylor
* the descendants of Lorna Terone
* the descendants of Emily Churchill
* Hughie Tjami and his descendants
* Keith Minungka and his descendants

who are recognised under the relevant traditional laws and customs by other Native Title Holders as having rights and interests in the Determination Area.

**Rights and Interests**

6. Subject to Paragraphs 7 and 8, the nature and extent of the native title rights and interests in relation to the Determination Area are non-exclusive rights to use and enjoy, in accordance with the Native Title Holders’ traditional laws and customs, the land and waters of the Determination Area, being:

(a) the right to access and move about the Determination Area;

(b) the right to hunt and fish on the land and waters of the Determination Area;

(c) the right to gather and use the natural resources of the Determination Area such as food, medicinal plants, wild tobacco, timber, resin, ochre and feathers;

(d) the right to share and exchange the subsistence and other traditional resources of the Determination Area;

(e) the right to use the natural water resources of the Determination Area;

(f) the right to live, to camp and, for the purpose of exercising the native title rights and interests, to erect shelters on the Determination Area;

(g) the right to cook on the Determination Area and to light fires for domestic purposes but not for the clearance of vegetation;

(h) the right to engage and participate in cultural activities on the Determination Area including those relating to births and deaths;

(i) the right to conduct ceremonies and hold meetings on the Determination Area;

(j) the right to teach on the Determination Area the physical and spiritual attributes of locations and sites within the Determination Area;

(k) the right to visit, maintain and protect sites and places of cultural and religious significance to Native Title Holders under their traditional laws and customs on the Determination Area;

(l) the right to be accompanied on to the Determination Area by those people who, though not Native Title Holders, are:

(i) spouses of Native Title Holders; or

(ii) people required by traditional law and custom for the performance of ceremonies or cultural activities on the Determination Area; or

(iii) people who have rights in relation to the Determination Area according to the traditional laws and customs acknowledged by the Native Title Holders; and

(m) in relation to Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the Native Title Holders, the right to speak for country and make decisions about the use and enjoyment of the Determination Area by those Aboriginal persons.

**General Limitations**

7. The native title rights and interests are for personal, domestic and communal use but do not include commercial use of the Determination Area or the resources from it.

8. The native title rights and interests described in Paragraph 6 do not confer possession, occupation, use and enjoyment of the Determination Area on the Native Title Holders to the exclusion of others.

9. Native title rights and interests are subject to and exercisable in accordance with:

(a) the traditional laws and customs of the Native Title Holders;

(b) the valid laws of the State and Commonwealth, including the common law.

For the avoidance of doubt, the native title interest expressed in Paragraph 6(e) (the right to use the natural water resources of the Determination Area) is subject to the *Natural Resources Management Act 2004* (SA).

10. Native title does not exist in the areas and resources described in Paragraphs 11, 13, 14 and 15 herein.

11. Native title rights and interests do not exist in respect of those parts of the Determination Area being any house, shed or other building or airstrip or any dam or other stock watering point constructed pursuant to the pastoral leases referred to in Paragraph 17(a) below constructed prior to the date of this determination. These areas include any adjacent land or waters, the exclusive use of which is necessary for the enjoyment of the improvements referred to.

12. To be clear, Paragraph 11 does not preclude the possibility of further extinguishment, according to law, of native title over other limited parts of the Determination Area by reason of the construction of new pastoral improvements of the kind referred to in Paragraph 11 after the date of this determination.

13. Native title does not exist in those areas described in Schedule 3, as it has been extinguished.

14. Native title rights and interests do not exist in:

(a) Minerals, as defined in s 6 of the *Mining Act 1971* (SA); or

(b) Petroleum, as defined in s 4 of the *Petroleum and Geothermal Energy Act 2000* (SA); or

(c) a naturally occurring underground accumulation of a regulated substance as defined in s 4 of the *Petroleum and Geothermal Energy Act 2000* (SA), below a depth of 100 metres from the surface of the earth; or

(d) a natural reservoir, as defined in s 4 of the *Petroleum and Geothermal* *Energy Act 2000* (SA), below a depth of 100 metres from the surface of the earth;

(e) geothermal energy, as defined in s 4 of the *Petroleum and Geothermal Energy Act 2000* (SA), the source of which is below a depth of 100 metres from the surface of the earth.

For the purposes of this Paragraph 14 and the avoidance of doubt:

(i) a geological structure (in whole or in part) on or at the earth’s surface or a natural cavity which can be accessed or entered by a person through a natural opening in the earth’s surface, is not a natural reservoir;

(ii) thermal energy contained in a hot or natural spring is not geothermal energy as defined in s 4 of the *Petroleum and Geothermal Energy Act 2000* (SA);

(iii) the absence from this order of any reference to a natural reservoir or a naturally occurring accumulation of a regulated substance, as those terms are defined in s 4 of the *Petroleum and Geothermal Energy Act 2000* (SA), above a depth 100 metres below the surface of the earth or geothermal energy the source of which is above a depth of 100 metres below the surface of the earth is not, of itself, to be taken as an indication of the existence or otherwise of native title rights or interests in such natural reservoir, naturally occurring accumulation of a regulated substance or geothermal energy.

15. Native title rights do not exist in the areas covered by Public Works (including the land defined in s 251D of the Native Title Act) which were constructed, established or situated prior to 23 December 1996 or commenced to be constructed or established on or before that date.

16. Public Works constructed, established or situated after 23 December 1996 have had such effect as has resulted from Pt 2, Div 3 of the Native Title Act.

**Other Interests & Relationship with Native Title**

17. The nature and extent of other interests to the Determination Area are:

(a) the interests within the Determination Area created by:

(i) Pastoral Lease No. 2440, Crown Lease Volume 1334 Folio 43 (Stevenson); and

(ii) Pastoral Lease No. 2528, Crown Lease Volume 1607 Folio 55 (Macumba);

(b) the interests of the Crown in right of the State of South Australia;

(c) the interests of persons to whom valid or validated rights and interests have been granted or recognised by the Crown in right of the State of South Australia or by the Commonwealth of Australia pursuant to statute or otherwise in the exercise of executive power including, but not limited to, rights and interests granted or recognised pursuant to the *Mining Act 1971* (SA), *Petroleum and Geothermal Energy Act 2000* (SA) and *Opal Mining Act 1995* (SA), all as amended from time to time;

(d) rights or interests held by reason of the force and operation of the laws of the State or of the Commonwealth;

(e) the rights to access land by an employee or agent or instrumentality of the State, Commonwealth or other statutory authority as required in the performance of his or her statutory or common law duties where such access would be permitted to private land;

(f) the rights and interests of all parties to the Indigenous Land Use Agreements listed in Schedule 4 arising by reason of those agreements;

(g) the rights and interests of Telstra Corporation Limited:

(i) as the owner or operator of telecommunications facilities within the Determination Area;

(ii) created pursuant to the *Post and Telegraph Act 1901* (Cth), the *Telecommunications Act 1975* (Cth), the *Australian Telecommunications Corporation Act 1989* (Cth), the *Telecommunications Act 1991* (Cth) and the *Telecommunications Act 1997* (Cth) including;

(1) to inspect land;

(2) to install and operate existing and new telecommunications facilities;

(3) to alter, remove, replace, maintain, repair and ensure the proper functioning of its existing and any new telecommunications facilities, including cabling, customer terminal sites and ancillary facilities; and

(iii) for its employees, agents or contractors to access its facilities in, and in the vicinity of, the Determination Area, in the performance of their duties;

(iv) under any leases, licences, access agreements or easements relating to its telecommunications facilities in the Determination Area.

18. The relationship between the native title rights and interests in the Determination Area that are described in Paragraph 6 and the other rights and interests that are referred to in Paragraph 17 (the Other Interests) is that:

(a) to the extent that any of the Other Interests are inconsistent with the continued existence, enjoyment or exercise of the native title rights and interests, the native title rights and interests continue to exist in their entirety, but the native title rights and interests have no effect in relation to the Other Interests to the extent of the inconsistency during the currency of the Other Interests; and otherwise,

(b) the existence and exercise of the native title rights and interests do not prevent the doing of any activity required or permitted to be done by or under the Other Interests, and the Other Interests, and the doing of any activity required or permitted to be done by or under the Other Interests, prevail over the native title rights and interests and any exercise of the native title rights and interests, but, subject to any application of ss 24JA and 24JB of the Native Title Act, do not extinguish them.

(c) the native title is subject to extinguishment by:

(i) the lawful powers of the Commonwealth and of the State of South Australia; and/or

(ii) the lawful grant or creation of interests pursuant to the laws of the Commonwealth and the State of South Australia.

**AND THE COURT MAKES THE FOLLOWING FURTHER ORDERS:**

19. The native title is not to be held in trust.

20. Irrwanyere Aboriginal Corporation RNTBC is to:

(a) be the prescribed body corporate for the purposes of s 57(2) of the Native Title Act; and

(b) perform the functions mentioned in s 57(3) of the Native Title Act after becoming the registered native title body corporate in relation to the Determination Area.

21. The parties have liberty to apply on 14 days notice to a single judge of the Court for the following purposes:

(a) to establish the precise location and boundaries of any public works and adjacent land and waters referred to in Paragraphs 15 and 16 of this Order;

(b) to establish the effect on native title rights and interests of any public works referred to in Paragraph 16 of this Order; or

(c) to determine whether a particular area is included in the description in Paragraph 11 or Schedule 3 of this Order.

Note: Entry of orders is dealt with in Order 39.32 of the Federal Court Rules 2011.

**SCHEDULE 1 – Location of and areas comprising the Determination Area**

The Determination Area is located wholly within and comprises all land and waters bounded by the following line:

External Boundary Description:

Commencing at a point being the intersection of the northern boundary of Block 1198, OH(Dalhousie) with the centreline of Stevenson River. Thence generally south-easterly along the centreline of Stevenson River to its intersection with the centreline of Macumba River. Thence generally south-easterly along the centreline of Macumba River to its intersection with Longitude 135.716786 degrees East, Latitude 27.204628 degrees South and generally easterly along the centreline of Macumba River to its intersection with the production southerly of the western boundary of Block 565, OH(Dalhousie).

Thence northerly along the said production and the said western boundaries of Block 565 and Block 564 to a south-eastern corner of Section 1495, OH(Dalhousie).

Thence generally westerly, southerly and westerly along the southern boundaries of the said Section 1495 and portion of the northern boundary of Block 1198, OH(Dalhousie) to the point of commencement.

Reference datum:

Geographical coordinates have been provided by the NNTT Geospatial Unit and are reference to the Geocentric Datum of Australia 1994 (GDA94), in decimal degrees and are based on the spatial reference data acquired from the various custodians at the time, with the exception of:

1. Areas covered by determinations made on 11 September 2008 as part of judgment in *Eringa, Eringa No 2, Wangkangurru/Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v The State of South Australia* [2008] FCA 1370 (for the avoidance of doubt).

2. The areas described or referred to in Paragraph 10 above and Schedule 3 below.

**SCHEDULE 2 - Map of the Determination Area**

The Determination Area is that area coloured coral.

**SCHEDULE 3 – Areas within the external boundaries of the Determination Area where native title does not exist**

The following areas are agreed to have been excluded from the Determination Area by reason of the fact that native title has been extinguished in those areas:

1. Any areas in relation to which native title has been extinguished by an act attributable to the State of South Australia pursuant to any of the following sections of the *Native Title (South Australia) Act 1994* (SA):

1.1. Sections 33 and 34 (Category A past acts);

1.2. Section 35 (Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests);

1.3. Sections 36B and 36C (Category A intermediate period acts);

1.4. Section 36D (Category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests);

1.5. Sections 36F and 36G (previous exclusive possession acts other than “excepted acts”);

2. Any areas in relation to which native title has been extinguished by an act attributable to the Commonwealth of Australia pursuant to any of the following sections of the Native Title Act:

2.1. Section 15(1)(a), (b) (Category A past acts);

2.2. Section 15(1)(c) (Category B past acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests);

2.3. Section 22B(a), (b) (Category A intermediate period acts);

2.4. Section 22B(c) (Category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests);

2.5. Sections 23B and 23C (previous exclusive possession acts).

3. All roads which have been delineated in a public map pursuant to s 5(d)(II) of the *Crown Lands Act 1929* (SA).

4. Any area in which native title rights and interests have otherwise been wholly extinguished.

**SCHEDULE 4 – Details of Indigenous Land Use Agreements in the Determination Area**

The following Indigenous Land Use Agreements (ILUA) are envisaged in relation to the Determination Area:

* “Whole-of-Claim” and Compensation ILUA
* Pastoral ILUA with Stevenson Station
* Pastoral ILUA with Macumba Station

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| : | KEANE cJ |
| DATE: |  |
| PLACE: | bloods creek |

**REASONS FOR JUDGMENT**

# INTRODUCTION

1. The Court is today to make orders declaring that the Eringa Peoples were and are the traditional owners of the land we are on. It is important to emphasise that the Court’s Orders are to not grant that status, but to declare that that status exists and has always existed at least since European settlement.
2. These orders are made under the *Native Title Act 1993* (Cth) (the Native Title Act), which, on behalf of all Australian people, recognised in its Preamble that the Aboriginal people inhabited this country for many many years prior to European settlement and were progressively dispossessed of their lands. The Preamble recorded that, by the overwhelming vote of the people of Australia, the Constitution was amended to enable laws such as the Native Title Act to be passed to facilitate the recognition by our shared legal system of the native title rights and interests in land which existed at the time of European settlement.
3. The determination is made with the consent of the State of South Australia and all of the respondents whose interests might be affected by the Orders to be made today. It is important to make that observation because the consent of the State and others whose rights might be affected reflects that the whole of the community shares in, and supports, recognising that status of the Eringa Peoples.

# THE DETERMINATION AREA

1. The Eringa Native Title Determination Application (No. SAD 6010 of 1998) (Eringa #1) was lodged on 13 March 1996 with the National Native Title Tribunal under the procedure then in force, and was referred to the Court following the enactment of the *Native Title Amendment Act 1998* (Cth). It covers land and waters in northern South Australia. The Eringa No. 2 Native Title Determination Application (No. SAD 6002 of 1999) (Eringa #2) was filed on 26 May 1999.
2. The Wangkangurru/Yarluyandi Native Title Claim (No. SAD 6016 of 1998) (the WY Claim) was filed with the Court on 21 August 1997, in relation to land and waters in northern South Australia and south-western Queensland. The WY Claim was referred to the Court on 30 September 1998. That part of Eringa #1 which is not overlapped by the WY Claim is dealt with in a separate proposed determination.
3. Since the filing of these claims, a portion of each of the Eringa #1, Eringa #2 and WY Claim areas was the subject of a determination of native title on 11 September 2008 (*Eringa, Eringa No 2, Wangkangurru/Yarluyandi and Irrwanyere Mt Dare Native Title Claim Groups v The State of South Australia* [2008] FCA 1370) (the *Witjira Determinations*).
4. In addition, since that time, the Eringa #2 claim was amended on 21 January 2011, and the WY Claim was amended on 8 October 2009, including in particular by the withdrawal of any claim to native title rights and interests in relation to land and waters to the west of the Witjira National Park.
5. The proposed determination before the Court is for that part of Eringa #1 overlapped by the WY Claim, for that part of the WY Claim overlapped by either Eringa #1 or Eringa #2, and for Eringa #2. It should be noted that a separate proposed determination is also to be made today for that part of Eringa #1 not overlapped by the WY Claim, a further Eringa claim, Eringa No. 3 Native Title Claim (No. SAD 189 of 2010) (Eringa #3). Thus, today, it is proposed that orders will be made determining the entirety of the Eringa #1, #2 and #3 claims and all parts of the WY Claim overlapped by any of the Eringa claims.
6. The determination area is an extensive area. It is fully described in Schedules 1 and 2 of the Orders. It is the area immediately to the south of the *Witjira Determinations* area, abutted to the east by the claim area in the WY Claim and to the west by the Eringa #1 and #3 claims to be the subject of a separate Determination at the same time as this Determination. Its southern boundary is roughly marked by the Macumba River.
7. The Native Title Act imposes requirements, particularly under ss 87, 87A, 223 and 225, before the Court can make a determination of native title. It is important to explain why those requirements are satisfied. It is especially important because the recognition given by the orders to be made will apply not just between the parties who have participated in the proceeding, but to all the people of Australia: *Munn (for and on behalf of the Guggari People) v The State of Queensland* (2001) 115 FCR 109 (*Munn*)*.*

# THE REQUIREMENTS OF THE Native Title ACT

1. Sections 87 and 87A of the Native Title Act set out the Court’s power to make orders by the consent of the parties. As the Determination in Eringa #1 (by both this determination and a further determination also to be made today) and Eringa #2 proceedings covers the entire claim area in each matter, the Determination is sought under s 87 of the Native Title Act. Section 87 requires the period of notice under s 66 to have elapsed. It has clearly done so in relation to all matters. It also requires that a signed copy of the agreed orders be filed with the Court. That has also taken place.
2. More substantively, s 87(2) requires that, for the Court to make the proposed consent determination of native title without a hearing, the Court must be satisfied that such an order would be within its power, and that it would be appropriate to do so.
3. The Determination in the WY Claim is sought under s 87A as the Determination only covers part of the claim area. Section 87A also requires the notice period under s 66 to have elapsed. That has occurred in the WY Claim. Section 87A(3) requires the Registrar to give notice to the other parties to the proceeding that the proposed determination of native title has been filed with the Court. On the filing of the proposed consent determination, the Registrar, in accordance with s 87A(3), advised all of the parties in the WY Claim of the proposed determination and advised them that they would have 14 days to object to the Determination being made. A copy of the proposed determination was enclosed with that correspondence. No responses have been received to that notification.
4. Again, more substantively, ss 87A(4)(a) and (b) require the Court to be satisfied that the proposed orders are within the power of the Court and that it is appropriate to make them.
5. In addition, because the orders seek a determination of native title, they must comply with s 94A of the Native Title Act. That section requires the proposed orders to set out details of the matters mentioned in s 225 of the Native Title Act.
6. Section 225 defines a determination of native title as:

A determination…whether or not native title exists in relation to a particular area (the ***determination*** ***area***) of land or waters and, if it does exist, a determination of:

(a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and

(b) the nature and extent of the native title rights and interests in relation to the determination area; and

(c) the nature and extent of any other interests in relation to the determination area; and

(d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and

(e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease—whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

1. The term “native title rights and interests” is defined in s 223(1) of the Native Title Act as:

[T]he communal, group or individual rights and interests of Aboriginal peoples…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…; and

1. the Aboriginal peoples…, by those laws and customs, have a connection with the land or waters; and
2. the rights and interests are recognised by the common law of Australia.
3. It is important to explain why those requirements are satisfied. It is especially important, because the recognition given by the orders to be made will apply not just between the parties who have participated in the proceeding, but to all the people of Australia: *Munn*.
4. In *Lota Warria (on behalf of the Poruma and Masig Peoples) v Queensland* (2005) 223 ALR 62, Black CJ said of those requirements at [5]-[8]:

There can be no doubt as to the jurisdiction of the court to make the orders sought (sees 81 of the Act) and there is nothing in the agreed terms that would suggest that the power of the Court would be exceeded by making those orders. As the proposed order sets out details of each of the matters mentioned in s 225, the requirements of s 94A of the Act are satisfied.

It remains only to consider whether it would be “appropriate” to make the orders sought.

As I have noted elsewhere, the discretion conferred by s 87(1) must be exercised judicially, and within the broad boundaries ascertained by reference to the subject matter, scope and purpose of the Act. The matters to be taken into account in the exercise of the discretion, and the weight to be given to those matters, may very well vary according to the particular circumstances of each case.

In the present case, it is clear that the parties have had independent and competent legal advice and there is no suggestion that the agreement was not freely entered into. The agreed terms of the proposed orders are unambiguous and are appropriate in the circumstances.

1. His Honour then proceeded to consider briefly the material before the Court. He considered it appropriate to make the orders as agreed.
2. More recently, the Court has been prepared to rely upon the processes of the relevant State or Territory about the requirements of s 223 being met to be satisfied that the making of the agreed orders is appropriate. That is because each State and Territory has developed a protocol or procedure by which it determines whether native title (as defined in s 223) has been established. It acts in the public interest and as the public guardian in doing so. It has access to anthropological, and where appropriate, archaeological, historical and linguistic expertise. It has a legal team to manage and supervise the testing as to the existence of native title in the claimant group. Although the Court must, of course, preserve to itself the question whether it is satisfied that the proposed orders are appropriate in the circumstances of each particular application, generally the Court reaches the required satisfaction by reliance upon those processes. They are commonly explained in the joint submissions of the parties in support of the orders agreed. That is the case in this instance.
3. Hence, in *Lovett* *on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474, North J stated at [36]-[37] that:

The Act [Native Title Act] is designed to encourage parties to take responsibility for resolving proceeding without the need for litigation. Section 87 must be construed in this context. The power must be exercised flexibly and with regard to the purpose for which the section is designed.

In this context, when the court is examining the appropriateness of an agreement, it is not required to examine whether the agreement is grounded on a factual basis which would satisfy the Court at a hearing of the application. The primary consideration of the Court is to determine whether there is an agreement and whether it was freely entered into on an informed basis: *Nangkiriny v State of Western Australia* (2002) 117 FCR 6; [2002] FCA 660, *Ward v State of Western Australia* [2006] FCA 1848. Insofar as this latter consideration applies to a State party, it will require the Court to be satisfied that the State party has taken steps to satisfy itself that there is a credible basis for an application: *Munn v Queensland* (2001) 115 FCR 109; [2001] FCA 1229.

1. The Court does not therefore routinely embark on its own inquiry of the merits of the claim made in the application to be satisfied that the orders sought are supportable and in accordance with the law: *Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588 at [3] per French J. However, it might consider that evidence for the limited purpose of being satisfied that the State is acting in good faith and rationally: *Munn* at [29]-[30] per Emmett J. See also *Smith v State of Western Australia* (2000) 104 FCR 494 at [38] per Madgwick J:

State governments are necessarily obliged to subject claims for native title over lands and waters owned and occupied by the State and State agencies, to scrutiny just as careful as the community would expect in relation to claims by non-Aborigines to significant rights over such land.

1. That approach has been adopted in a number of recent decisions: *Jungarrayi on behalf of the Mirtartu, Warupunju, Arrawajin and Tijampara Landholding Groups v Northern Territory of Australia* [2011] FCA 766; *Kngwarraye on behalf of the members of the Arnerre, Wake-Akwerlpe, Errene and Ileyarne Landholding Groups v Northern Territory of Australia* [2011] FCA 765; *Campbell v Northern Territory of Australia* [2011] FCA 580; *King v Northern Territory of Australia* [2011] FCA 582; *Wavehill v Northern Territory of Australia* [2011] FCA 581; *Wavehill v Northern Territory of Australia* [2011] FCA 584; *Young v Northern Territory of Australia* [2011] FCA 585; *Young v Northern Territory of Australia* [2011] FCA 583; *Jones v Northern Territory of Australia* [2011] FCA 573; *Carlton v Northern Territory of Australia* [2011] FCA 576; *Paddy v Northern Territory of Australia* [2011] FCA 574; *Simon v Northern Territory of Australia* [2011] FCA 575; *Long v Northern Territory of Australia* [2011] FCA 571; *Rosewood v Northern Territory of Australia* [2011] FCA 572; *Barunga v State of Western Australia* [2011] FCA 518; *Goonack v State of Western Australia* [2011] FCA 516; *Kngwarrey on behalf of the members of the Irrkwal, Irrmarn, Ntewerrek, Aharreng, Arrty/Amatyerr and Areyn Landholding Groups v Northern Territory of Australia* [2011] FCA 428; and *Nelson v Northern Territory of Australia* (2010) 190 FCR 344 (*Nelson*).
2. In *Nelson*, Reeves J adopted that approach and explained the reasons for doing so in the following way at [12]-[13]:

It is appropriate to make some comments about the difficult balance a State party needs to strike between its role in protecting the community’s interests, including the stringency of the processes it follows in assessing the underlying evidence going to the existence of native title, and its role in the native title system as a whole, to ensure that it, like the Court and all other parties, takes a flexible approach that is aimed at facilitating negotiation and achieving agreement. In *Lovett* North J commented:

… There is a question as to how far a State party is required to investigate in order to satisfy itself of a credible basis for an application. One reason for the often inordinate time taken to resolve some of these cases is the overly demanding nature of the investigation conducted by State parties. The scope of these investigations demanded by some States is reflected in the complex connection guidelines published by some States.

The power conferred by the Act on the Court to approve agreements is given in order to avoid lengthy hearings before the Court. The Act does not intend to substitute a trial, in effect, conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application. The Act contemplates a more flexible process than is often undertaken in some cases.

I respectfully agree with North J in these observations. In my view, it would be perverse to replace a trial before the Court with a trial conducted by the State party respondent and I do not consider that is what is intended by the provisions of s 87 of the Act.

1. In this matter, the Court has had the benefit of the joint submissions. They confirm that the State is satisfied that the agreed determination is a proper one. It has had the benefit of a thorough examination of the available evidentiary material. The joint submission in turn refers at considerable length to the material on which it has relied.
2. It is helpful to refer to that material in a little detail.
3. The evidence in these matters includes three reports co-authored by anthropologists for the South Australian Native Title Services (SANTS), Ms Susan Woenne-Green, Ms Lyn Coad and Mr Jacob Habner. Ms Woenne-Green is an anthropologist with many years’ experience with Western Desert peoples in South Australia. Ms Coad has worked with SANTS since 2000. Mr Habner was a research officer with SANTS from 2004 to 2009. Their reports initially consisted of a 268 page Witjira Native Title report, plus appendices, genealogies and a site index. A Witjira Supplementary Report and further statements were subsequently provided. In addition, the applicants rely on evidence, including anthropological reports, prepared by Dr Scott Cane in November 2005 and February 2006.
4. Dr David Martin, the State’s independent consultant anthropologist assessed the evidence. Dr Martin has extensive experience in a large number of native title claims and has been an adviser in native title matters for both the State and for the applicants.
5. The fact that the State, through its legal representation, is sufficiently satisfied as to the proposed evidence of the Eringa Peoples and has considered the interests of the community generally means the Court can move with some assurance to proceed to make the Determination. In this matter, it is evident that the State has applied a rigorous approach to assess the proposed evidence of the claims, broadly in accordance with its document entitled *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports* (sometimes called the State’s CD Policy).
6. Each of the respondents has received a position paper explaining the basis for the State’s view and has had the opportunity to review its conclusions and to ask any questions about them. I am also satisfied that the consent of the State and the other respondent parties to the proposed determination is a fully informed and conscientious one, having considered the requirements of the Native Title Act.
7. However, it is fitting that I should explain why the Court is satisfied of those matters. The evidence must show that there is a recognisable group or society that presently recognises and observes traditional law and customs in the determination area. In defining that group or society, the following must also be addressed:
8. that the claim group comprises a society united in and by their acknowledgement and observance of a body of accepted laws and customs; and
9. that the present day body of accepted laws and customs of the society in essence is the same body of laws and customs acknowledged and observed by the ancestors or members of the society adapted to modern circumstances; and
10. that the acknowledgement and observance of those laws and customs has continued substantially uninterrupted by each generation since sovereignty, and that the society has continued to exist throughout that period as a body united in and by its acknowledgement and observance of those laws and customs.
11. The claim group must show that it still possesses rights and interests under the traditional laws acknowledged and the traditional customs observed by them, and that those laws and customs give them a connection to the land. See generally *Members of the* *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Risk v Northern Territory* [2006] FCA 404; and *Western Australia v Ward* (2002) 213 CLR 1.

## The relevant society for the purposes of s 223 of the Native Title Act

1. The relevant societies to which the applicants belong are the Lower Southern Arrernte and the Luritja/Yankunytjatjara. Any one claimant may identify with a different one of these labels at different times and a claimant who identifies as one label can be referred to by reference to another label by others. This flexibility in designation is common across the region and well-documented in the anthropological literature about the region.
2. In the *Witjira Determinations*, the Court was satisfied that the Lower Southern Arrernte, the Luritja/Yankunytjatjara peoples, and the Wangkangurru people, where those claim areas overlapped the WY Claim, formed a society united by traditional laws and customs sufficient to comply with the Native Title Act. These groups have been described as closely linked although distinct societies with shared rights and responsibilities. This is supported by genealogies and ethnographies from Ronald and Catherine Berndt, T.G.H Strehlow and Doohan.
3. I am satisfied that the level of detail provided by the applicants to identify the native title claim group and its society satisfies the requirements of the Native Title Act.

## The relationship between the claim group’s society and the society in the determination area at sovereignty

1. The association of the Lower Southern Arrernte, and the Luritja/Yankunytjatjara people with the area of the Witjira National Park was acknowledged in the *Witjira Determinations*. In that matter, Lander J said the following at [27]-[31]:

In support of the application for a consent determination of native title, the State of South Australia has filed written submissions on behalf of all of the principal parties in each of the four claims. The submissions also attach a summary of the evidence in support of a determination filed in the proceedings, being various reports jointly authored by Ms Susan Woenne-Green, Ms Lyn Coad and Mr Jacob Habner, who are anthropologists with South Australian Native Title Services Ltd.

The people asserting native title rights and interests in the Park, the Lower Southern Arrernte and Wangkangurru, are two ‘closely interrelated and interpenetrating yet distinct societies’. The link of the claimants to the land and waters of the park at the time of sovereignty is evidenced by numerous ancestors of the contemporary claimants who were born at various places in the area during the late nineteenth century.

The continued existence and vitality of the societies’ traditional laws and customs is said to have traditionally been passed down through patrifilial association, which more recently evolved into a cognatic form, though with an emphasis in the Lower Southern Arrernte claimants on patrifilial association where that can be established. Accordingly, the manner in which the claimants have gained rights and interests is systematic and traditional.

The claimants have demonstrated that the individual societies are united in their acknowledgment and observance of traditional laws and customs by providing contemporary evidence of ways in which that is achieved. That included, for the Lower Southern Arrernte, claimants evidence concerning an age based hierarchy, visiting and cleaning sacred sites, teaching children about bush tucker in the Park, gender and other restrictions on ritual and religious information and behaviour, handing down of names, initiation ceremonies, particular kinship terms, songs and stories. For the Wangkangurru claimants, the evidence concerned a regional system of authority, age based hierarchy, belief in spiritual sanctions, handing down of names, kinship terms, the passing down of knowledge, stories and the use of bush tucker.

The claimants have maintained their connection with the area by the inheritance of rights from an ancestor. Other forms of physical connection exist through members visiting and cleaning sacred sites, teaching children about bush tucker in the Park, a claimant acting as a park ranger, and regular camping trips in the Park for the purpose of teaching dreaming stories to children. A number of claimants have also played an important role in the Park’s land management.

1. Those comments apply equally to this matter. In addition, the Joint Submission filed on behalf of the applicants and the State states that the National Native Title Tribunal Enhanced Research Report clearly shows a similar association for the areas to the west. The available reports include substantial family history material that links the contemporary claimants’ ancestors to the consent determination areas at various times during the nineteenth century, and point to specific individual ancestors of today’s claimants who lived in the determination areas.
2. On the basis of the information provided, I am satisfied that the contemporary Lower Southern Arrernte and Luritja/Yankunytjatjara society is directly linked to the native title holders at sovereignty.

## Has there been substantially uninterrupted observance of traditional laws and customs since sovereignty?

1. In this regard, I refer to the passage quoted from the *Witjira Determinations* above. The relevant laws and customs are those of the Lower Southern Arrernte and Luritja/Yankunytjatjara peoples which have been well documented in the ethnographic literature. Dr Martin assessed the material and prepared two reports in this regard.
2. The groups continue to observe rules about the distribution of rights according to seniority and authority. The traditional laws and customs that are practised in relation to authority appear to be directly related to knowledge of the sacred geography of the region.
3. Dr Martin found that continuing traditional laws and customs included transmission of knowledge to younger generations through teachings, the structure of land holding groups, contemporary kinship terminology, gender restriction, naming conventions and customs regulating death and burial, and knowledge of dreamings. He found that the traditional significance of birthplace has changed from the importance of an individual’s birthplace to that of a significant forebear. He accepts, however, that this is an acceptable change due to the change in lifestyles since the increase in both pastoral work and European presence.
4. On the basis of the evidence, I am satisfied that sufficient numbers of Lower Southern Arrernte and Luritja/Yankunytjatjara are still actively engaged in and affected by their traditions. I also accept that they adhere to and actively participate in those traditions, and that it is by those traditions that connection to country is established.

## Connection to the determination area by traditional laws and customs

1. Examples of the claimants’ connection to the land include birth on the land, inheritance or transmission of rights from an ancestor, and prolonged associations and knowledge of responsibilities for the Tjukurpa or other relevant traditional laws and customs gained from older people while living or working on a station. The evidence establishes that the connection to the land is maintained by visiting and clearing sacred sites and learning the Tjukurpa or other relevant traditional laws and customs. They teach others and learn from others about the culture on the land. Connections through birth and death places continue, as do familial connections and through hunting grounds.
2. Most of the claimants live on or close to the determination area.
3. I am satisfied that there is sufficient evidence of continued connections to the claim area by the claim group’s laws and customs.

## The relationship between the traditional laws and customs of the relevant society and the rights and interests claimed by the applicants

1. The Determination sets out the rights and interests agreed between the parties. These rights are consistent with the traditional rights and interests that would have been observed at sovereignty as supported by the anthropological evidence.
2. Claimants’ statements and reports provide examples of such rights. Some notable examples include claimants sharing and controlling access, regulating access and behaviour at important sites, teaching on country, speaking for the country, site clearance, asking permission for water, and attending ceremonies on the nearby park.
3. Examples of established rights for the determination area include:
* undertaking ceremonial activity on the area;
* carrying out and maintaining burials on the area;
* teaching and transmitting cultural knowledge on country;
* hunting and fishing;
* gathering and using natural resources;
* sharing and exchanging the subsistence and other traditional sources;
* using water; and
* living and camping and cooking.
1. I am satisfied that the claimants engage in the activities covered by the rights and interests included in the Determination and that these rights and interests arise from traditional law and custom.

## Section 225 of the Native Title Act

1. Section 225 of the Native Title Act governs what determinations of native title must include. I am satisfied that the Determination complies with each requirement of s 225(a). Paragraph 5 of the Determination defines the group of native title holders and the criteria by which they have group membership. This reflects the evidence about relevant ancestors through whom individuals hold rights and interest in land. It also fulfils the requirements of s 61(4) of the Native Title Act as it is possible to ascertain whether any particular individual is within the native title claim.
2. Paragraphs 6 to 9 of the Determination set out the nature and extent of the native title rights and interests in the determination area. Schedule 3 and Paragraph 10 of the Determination lists areas which have been excluded from the determination area, in the case of Parts 1 to 3 of that Schedule, by reason of the generic exclusion by the applicants of any area over which native title has been extinguished. Other areas have been specifically excluded in Part 4 of Schedule 3 for the avoidance of doubt.
3. Paragraphs 10 to 16 of the Determination list the nature and extent of other interests in the determination area. This has been the subject of some negotiation between the applicants and the State and the various respondents. There has been ample opportunity for any other interest-holders in the area to identify themselves and seek to be joined as a party to the claims. The State’s tenure searches have not identified any other relevant interest holders in the area.
4. Paragraph 17 of the Determination describes the relationship between the native title rights in Paragraphs 6 and those other rights in Paragraphs 10 to 16.
5. Most of the determination area is covered by non-exclusive pastoral leases. There are no areas where the native title rights and interests confer possession, occupation, use and enjoyment of that land and waters on the native title holders to the exclusion of all others.

## Other matters

1. All parties to the proceeding have agreed on the making of and the terms of the Determination and have filed signed copies of the Determination with the Court.
2. Eringa #2 was lodged in 1999, covering a portion of the Witjira National Park, as well as part of Macumba station.
3. The WY Claim was lodged in 1997, covering all of Eringa #2, a portion of Eringa #1 and a large stretch of country to the east of Witjira National Park across the Simpson Desert. The portion of the WY Claim that overlaps the Eringa #1 and Eringa #2 claims is pastoral land to the south of the Witjira National Park (the subject of the 2008 Consent Determination). The pastoral leases affected by the WY Claim are Stevenson and Macumba.
4. I am satisfied that all relevant interest holders in the area have had an opportunity to take part in the proceeding. SANTS is the only relevant representative body for the determination area and is a party to the Determination. While the State of Queensland is party to the WY Native Title Claim, the determination area is wholly within South Australia and so the State of South Australia is the only relevant government party to the Determination. The Commonwealth is not a party to, nor intervenor in, any of the proceedings, and has not identified any specific interests in any of them, including the determination areas. Nonetheless, the Commonwealth has been notified of the proceedings by the National Native Title Tribunal and informed of progress of the consent determination negotiations by the State. While the Diamantina Shire Council is a party to the WY Claim, it does not have any interests in any of the determination area. There is no relevant local government body for the South Australian portion of the area of the proceedings.
5. The parties who have signed the draft determination are:
6. The applicants
7. The State
8. Telstra Corporation
9. SANTS
10. The pastoral respondents
11. The mining respondents
12. All parties have had the opportunity to obtain independent legal advice in the proceedings.
13. The determination area in Schedule 1 to the Determination contains a detailed description of the claim area.
14. On the basis of all of the evidence, I am satisfied that the requirements of ss 223 and 225 have been met.
15. Sections 87 and 87A of the Native Title Act allows the Court to make a consent determination in the native title proceeding even though the proceeding has not been heard by the Court. I have no doubt that it is appropriate to make a final determination over the determination area on the basis of the evidence presented on behalf of the applicants for the reasons set out above.
16. A tenure history of the claim area was provided by the State and made available to all the parties to the claims. Rather than carry out a detailed historical analysis of this tenure, the State has described generically in the Determination, where the parties are agreed that areas exist, where native title has been wholly extinguished. Those areas within the determination area where native title has been extinguished are described in Schedule 3 of the proposed determination.
17. The remainder of the claim areas comprises pastoral leases over which there has been partial extinguishment of native title. The parties are agreed that the claimants do not have any right of exclusive possession over those areas and that the native title rights of the claimants co-exist with those of the pastoralists, with the latter prevailing in the event of inconsistency. In line with decision of the Full Court of the Federal Court in *De Rose v State of South Australia (No 2)* [2005] FCAFC 110 (*De Rose*) and subsequent consent determinations in this State, Paragraph 11 of the Determination recognises the extinguishment of native title rights and interests over the pastoral leases within the determination area where certain improvements authorised by the pastoral leases have been constructed.
18. I record that due to disagreement on whether the Full Court in *De Rose* held that certain future pastoral improvements occurring after the date of the consent determination extinguish native title, Paragraph 12 of the Determination has been drafted to cover the position until the law in relation to future improvements is settled.
19. Extinguishment of native title rights and interests in the determination area by reason of the construction of public works is provided for in Paragraph 15 of the Determination. This paragraph provides for native title to be wholly extinguished over public works constructed, established or situated, or commenced to be constructed or established prior to 23 December 1996, and leaves it to Pt 2, Div 3 of the Native Title Act to determine the effect of those public works constructed, established or situated after 23 December 1996.

# Conclusion

1. The Native Title Act,as recognised by the Court, encourages the resolution by agreement of claims for determinations of native title. For the reasons set out above, the Determination is appropriate and should be made in this proceeding. I will make orders accordingly. The Court, by these orders, recognises once and for all the native title rights and interests of the Lower Southern Arrernte and Luritja/Yankunytjatjara people in this area.

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| I certify that the preceding sixty-nine (69) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Keane. |

Associate:

Dated: 13 December 2011