

# FEDERAL COURT OF AUSTRALIA

## **Lennon on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v The State of South Australia [2011] FCA 474**

Citation: Lennon on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group v The State of South Australia [2011] FCA 474

Parties: **WILLIAM HERBERT LENNON SNR, IAN CROMBIE, DAVID BROWN AND JEAN WOOD ON BEHALF OF THE ANTAKIRINJA MATU-YANKUNYTJATJARA NATIVE TITLE CLAIM GROUP v THE STATE OF SOUTH AUSTRALIA AND OTHERS**

File number: SAD 6007 of 1998

Judge: **MANSFIELD J**

Date of judgment: 11 May 2011

Date of hearing: 11 May 2011

Place: Adelaide

Division: GENERAL DIVISION

Category: No catchwords

Number of paragraphs: 57

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Services:

South Australian Native Title Services

**IN THE FEDERAL COURT OF AUSTRALIA  
SOUTH AUSTRALIA DISTRICT REGISTRY  
GENERAL DIVISION**

**SAD 6007 of 1998**

**BETWEEN:**                    **WILLIAM HERBERT LENNON SNR, IAN CROMBIE,  
DAVID BROWN AND JEAN WOOD ON BEHALF OF THE  
ANTAKIRINJA MATU-YANKUNYTJATJARA NATIVE  
TITLE CLAIM GROUP**  
**Applicants**

**AND:**                         **THE STATE OF SOUTH AUSTRALIA AND OTHERS**  
**Respondents**

**JUDGE:**                     **MANSFIELD J**

**DATE OF ORDER:**    **11 MAY 2011**

**WHERE MADE:**         **ADELAIDE**

**THE COURT NOTES THAT:**

- A**         The Applicant first lodged Native Title Determination Application No. SAD 6007 of 1998 (the Application) with the National Native Title Tribunal on 14 November 1995 in relation to lands and waters in northern South Australia which are now the subject of a proposed determination of native title. The Application was referred to the Federal Court of Australia on 30 September 1998.
- B**         The Applicant, the State of South Australia and the other respondents have reached an agreement as to the terms of a determination of native title to be made in relation to the land and waters covered by the Application. They have filed with this Court pursuant to section 87(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.
- C**         The State of South Australia asserts that the Vesting (as defined in paragraph 1 (b)) of those parts of the Determination Area in the Crown listed in *Schedule 4* (“the *Schedule 4 Areas*”) means that the exercise of all native title rights and interests in relation to those areas (whether exclusive or non-exclusive) were suppressed at the date of the Vesting, pursuant to the non-extinguishment principle established by the Native Title Act. Accordingly, all native title rights and interests in the *Schedule 4 Areas* remain

suppressed for as long as those areas remain vested in the Crown under the *National Parks and Wildlife Act 1972* (“the NPWA”) or other relevant State legislation.

- D** The Applicants assert with regard to the *Schedule 4* Areas that some native title rights are not suppressed by the Vesting but acknowledge the operation of the non-extinguishment principle provided for in the *Native Title Act*.
- E** The Parties have agreed to the following orders in relation to the native title rights and interests, reflecting (insofar as those orders relate to the *Schedule 4* Areas) a compromise of the issue addressed in Recitals C and D.
- F** The provisions in this determination on the applicability of sections 47A and 47B of the *Native Title Act* are the result of a compromise reached between the parties.
- G** The parties acknowledge that the effect of the making of the determination will be that the members of the native title claim group, in accordance with the 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.
- H** 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:
  - (a) unless the contrary intention appears, the words and expressions used have the same meaning as they are given in Part 15 of the *Native Title Act*;
  - (b) “the Vesting” means the vesting of a Park or Reserve in the Crown pursuant to the NPWA as listed in *Schedule 4*; and

- (c) 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.
2. Native title exists in the areas described in *Schedule 1* with the exception of those areas described in paragraph 9, paragraph 12 and *Schedule 3* (“the Determination Area”).

### **Native Title Holders**

3. Under the relevant traditional laws and customs of the Western Desert Bloc, the native title holders comprise those Aboriginal people who have a spiritual connection to the Determination Area and the *Tjukurpa* associated with it because:
- (a) the Determination Area is his or her country of birth (also reckoned by the area where his or her mother lived during the pregnancy); or
  - (b) he or she has had a long-term association with the Determination Area such that he or she has traditional geographical and religious knowledge of that country; or
  - (c) he or she has an affiliation to the Determination Area through a parent or grandparent with a connection to the Determination Area as specified in subparagraphs (a) or (b) above;

and are recognised under the relevant Western Desert traditional laws and customs by other members of the native title claim group as having rights and interests in the Determination Area.

### **Rights and Interests**

4. Subject to paragraphs 5, 6, 7 & 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 and other structures 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.

- (m) in relation to Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged and observed 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**

5. 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.
6. Subject to paragraph 7, the native title rights and interests described in paragraph 4 do not confer possession, occupation, use and enjoyment of the Determination Area on the native title holders to the exclusion of others.
7. The nature and extent of native title rights and interests in relation to each part of the Determination Area referred to in *Schedule 5* (being the only areas within the Determination area where any extinguishment of native title rights and interests over the areas therein prior to 14 November 1995 is to be disregarded) are an entitlement against the whole world to possession, occupation, use and enjoyment of the land and waters of that part.
8. 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 4(e) (the right to use the natural water resources of the Determination Area) is subject to the *Natural Resources Management Act 2004* (SA).
9. Native title does not exist in the areas and resources described in paragraphs 10, 12, 13 and 15 herein.
10. 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 16(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.

11. To be clear, paragraph 10 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 10 after the date of this determination.
12. Native title rights and interests do not exist in:
  - (a) Minerals, as defined in section 6 of the *Mining Act 1971* (SA); or
  - (b) Petroleum, as defined in section 4 of the *Petroleum and Geothermal Energy Act 2000* (SA); or
  - (c) a naturally occurring underground accumulation of a regulated substance as defined in section 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 section 4 of the *Petroleum and Geothermal Energy Act 2000* (SA), below a depth of 100 metres from the surface of the earth; or
  - (e) geothermal energy, as defined in section 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 12 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 section 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 section 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.

13. Native title rights do not exist in the areas covered by Public Works (including the land defined in section 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.
14. Public Works constructed, established or situated after 23 December 1996 have had such effect as has resulted from Part 2, Division 3, of the *Native Title Act*.
15. Those areas described in *Schedule 3* have been excluded from the Determination Area because native title has been extinguished.

#### **Other Interests & Relationship with Native Title**

16. The nature and extent of other interests to the Determination Area are:
  - (a) the interests within the Determination Area created by the following pastoral leases:

<b>Lease name</b>	<b>Pastoral Lease No</b>	<b>Crown Lease</b>
Anna Creek	PE2433	Volume 1331 Folio 50
Arckaringa	PE2418	Volume 1333 Folio 7
Balta Baltana South	PE2147	Volume 1159 Folio 4
Bon Bon	PE2239	Volume 1279 Folio 30
Bulgunnia	PE2331	Volume 1290 Folio 6
Carnding Well	PE2375	Volume 1298 Folio 6
Coladding	PE2526	Volume 1605 Folio 68
Coorikiana	PE2476	Volume 1397 Folio 26
Evelyn Downs	PE2533	Volume 1625 Folio 85

<b>Lease name</b>	<b>Pastoral Lease No</b>	<b>Crown Lease</b>
Ingomar	PE2339	Volume 1292 Folio 41
Lake Wirrida	PE2153	Volume 1165 Folio 1
Mabel Creek	PE2527A	Volume 1629 Folio 19
Malbooma	PE2246	Volume 1281 Folio 46
McDouall Peak	PE2341	Volume 1292 Folio 42
Millers Creek	PE2315	Volume 1286 Folio 42
Mobella	PE2442	Volume 1356 Folio 27
Mount Barry	PE2411	Volume 1327 Folio 9
Mount Christie	PE2469	Volume 1393 Folio 14
Mount Clarence	PE2508	Volume 1597 Folio 74
Mount Eba	PE2340	Volume 1289 Folio 41
Mount Penrhyn	PE2527	Volume 1628 Folio 71
Mount Vivian	PE2288	Volume 1285 Folio 36
Mount Willoughby	PE2515	Volume 1595 Folio 92
Muckunippie	PE2154	Volume 1165 Folio 33
Mulgathing	PE2158	Volume 1170 Folio 7
Part Commonwealth Hill	PE2424	Volume 1332 Folio 22
Part Commonwealth Hill	PE2169	Volume 1205 Folio 2
Part McDouall Peak	PE2159	Volume 1170 Folio 8
Part Mulgathing	PE2176	Volume 1213 Folio 38
Part Woorong Downs	PE2175	Volume 1213 Folio 37
Part Woorong Downs	PE2178	Volume 1214 Folio 28
Pinding	PE2201	Volume 1275 Folio 42
Wilgena	PE2364	Volume 1298 Folio 30
Wintinna West	PE2532A	Volume 1644 Folio 77

- (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;

- (d) rights and interests granted or recognised pursuant to the *Mining Act 1971* (SA), *Petroleum Act 2000* (SA) and *Opal Mining Act 1995* (SA), all as amended from time to time. For the avoidance of doubt and without limiting the above, these include:

<b>Mining Interest Holder</b>	<b>Mining Interest reference</b>
Chignola, Emilio	MC 3308 & 3309, ML 5920
District Council Of Coober Pedy	EML 5505 & EML 5716
Dominion Gold Operations Pty Ltd	ML 6103, MPL 63, 65 & 66
Hiltaba Gold Pty Ltd	ML 4650, 4667, 5179 & 5300
Low Impact Diamond Drilling Specialists Pty Ltd	MC 4195
Mccormack Constructions Pty Ltd	EML 5621
Mccormack, Albert Hamilton	EML 5060, 5675, 5803 & 5804
Nagyszollosi, Alfonz Imre	EML 5551, 5699 & 5725
OZ Minerals Prominent Hill Operations Pty Ltd	EML 6234, 6236-6242, 6278-6296 & 6299-6301, ML 6228, MPL 81-84, 86-89, 91, 93-94, 96-97, 101, 112-113, 114(pt), 115(pt), 116 (pt) & 119-121
South Australian Coal Limited	RL 100 & 104
Southern Iron Pty Ltd	EML 6363-6382, MC3809-3810, ML 6314, MPL 125-131 & MPLA T02862-T02863
Termite Resources NL	ML 6303

- (e) rights or interests held by reason of the force and operation of the laws of the State or of the Commonwealth;
- (f) 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;
- (g) the rights and interests of all parties to the Indigenous Land Use Agreements listed in *Schedule 7* arising by reason of those agreements;

- (h) the rights and interests of Telstra Corporation Limited (or its corporate successor):
  - (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 rights:
    - (1) to inspect land;
    - (2) to install and operate existing and new telecommunication 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
    - (4) for its employees, agents or contractors to access the Determination Area for the purposes of exercising the rights in (1), (2) and (3) above in respect of telecommunications facilities in and in the vicinity of the Determination Area;
  - (iii) under or arising from s 18 of the *Crown Land Management Act 2009* (SA) or under s 5 of the *Crown Lands Act 1929* (SA) in respect of the following areas under Telstra's care, control and management:
    - (1) Allotment 1 in DP 28565, Out of Hundreds (Tarcoola), CR 5752/199 ("Jumbuck DRCS");
    - (2) Allotment 1590 in DP 28562, Out of Hundreds (Kingoonya), CR 5752/198 ("Laurie Hills DRCS");
    - (3) Allotment 1 in DP 28564, Out of Hundreds (Tarcoola), CR 5365/763 ("Regal DRCS");

- (4) Allotment 2 in DP 28563, Out of Hundreds (Billakalina), CR 5421/165 (“Soward DRCS”);
  - (5) Allotment 1 in DP 28562, Out of Hundreds (Kingoonya); CR 5752/197 (“Sundown DRCS”); and
- (iv) under any leases, licences, access agreements or easements relating to its telecommunications facilities in the Determination Area.
- (i) the Commonwealth rights and interests in the Woomera Prohibited Area, being:
- (i) the rights and interests authorised under regulation 34 of the *Defence Force Regulations* 1952 on 22 May 2007, by the Minister for Defence, to enter upon, and the use on behalf of the Commonwealth of, the area of land situated in the State of South Australia and delineated on the plan numbered GP 249/1989 deposited in the General Registry Office at Adelaide, South Australia, for the purpose of carrying out operations for the testing of war material; and
  - (ii) the rights and interests of the Commonwealth in the area, being all that piece of land situate in the State of South Australia and delineated on the plan deposited in the General Registry Office at Adelaide and numbered GP 249/1989, declared as a prohibited area under regulation 35 of the *Defence Force Regulations* 1952 on 29 June 1989 by the Minister for Defence Science and Personnel (*Commonwealth of Australia Gazette* No GN 26, 12 July 1989, 1564).
- (j) the rights, interests and entitlements of ETSA Utilities (a partnership of Spark Infrastructure SA (No.1) Pty Ltd, Spark Infrastructure SA (No.2) Pty Ltd, Spark Infrastructure SA (No.3) Pty Ltd, CKI Utilities Development Limited and HEI Utilities Development Limited) and its related and successor entities, including its rights, interests and entitlements:
- (i) to exercise its entitlements and discharge its obligations as the owner and/or operator of electricity infrastructure (as defined in the Electricity Act 1996 (SA) (“Electricity Act”) and telecommunications facilities and

infrastructure within the Determination Area (“Existing Infrastructure”);

- (ii) to exercise its entitlements and discharge its obligations as the holder of a licence under the Electricity Act and/or as an electricity entity under the Electricity Act;
- (iii) to exercise its entitlements and discharge its obligations as the holder of a carrier licence under the Telecommunications Act 1997 (Cth);
- (iv) to install new electricity and telecommunications infrastructure within the Determination Area (“New Infrastructure”) and modify, maintain and repair Existing Infrastructure;
- (v) under easements, leases or licences (whether registered, unregistered, statutory or otherwise) relating to Existing Infrastructure or New Infrastructure within the Determination Area (“Easements”);
- (vi) to provide its employees, agents or contractors with access to Existing Infrastructure, New Infrastructure and the Easements within the Determination Area; and
- (vii) to the extent permitted by law, to restrain any person from performing any act, or compel any person to perform any act, for the purposes of ensuring that ETSA Utilities complies with its obligations under any law, including, but not limited to, excluding any person from entering an area containing Existing Infrastructure or New Infrastructure for the purposes of maintaining the safety of any person and the security and protection of such infrastructure;

17. Subject to paragraph 5, the relationship between the native title rights and interests in the Determination Area that are described in paragraph 4 and the other rights and interests described in paragraph 16 (“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 section 24JA of the *Native Title Act*, do not extinguish them;
- (c) in the *Schedule 4 Areas*, the native title rights and interests continue to exist but have no effect in relation to the Vesting.
- (d) 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

18. For the avoidance of doubt, the relationship between the Aboriginal-held interests listed in *Schedule 6* and the native title rights and interests in the Determination Area that are described in paragraph 4 is governed by the non-extinguishment principle as defined in section 238 of the *Native Title Act*.

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

- 19. On this determination coming into effect, the native title is not to be held in trust.
- 20. The Antakirinja Matu-Yankunytjatajara Aboriginal Corporation is to:
  - (a) be the prescribed body corporate for the purposes of s 57(2) of the *Native Title Act 1993* (Cth); and
  - (b) perform the functions mentioned in s 57(3) of the *Native Title Act 1993* (Cth) after becoming a registered native title body corporate.

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 13 and 14 of this Order;
  - (b) to determine the effect on native title rights and interests of any public works as referred to in paragraph 14 of this Order; or
  - (c) to determine whether a particular area is included in the description in paragraph 10 or *Schedule 3* of this Order.

## Schedules

### **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 a point being the south-westernmost corner of Allotment 2009 DP 33311, thence northerly, easterly and northerly along a western, a northern and a western boundary of the said Allotment 2009 to its intersection with western boundary of Piece 1 DP 45289.

Thence northerly and easterly along the westernmost and a northern boundary of the said Piece 1 and easterly in a straight line to the north-western corner of Block 1242, OH (Wintinna) and easterly along the northern boundary of the said Block 1242 and easterly in a straight line to its intersection with the eastern boundary of Block 1215, OH(Oodnadatta) at Latitude 27.839209 degrees South.

Thence southerly along the eastern boundary of the said Block 1215 to Latitude 27.846807 degrees South thence generally westerly, south-westerly and south-easterly, south-westerly and south-easterly in straight lines connecting the following coordinate points

Longitude (East)	Latitude (South)
135.193440	27.846677
135.001927	29.093096
135.955450	29.851079
135.936706	29.872461

Thence south-easterly to the eastern boundary of Allotment 2042 in DP 40325 at Latitude 30.041105 degrees South.

Thence southerly and generally westerly along the western and southern boundaries of the said Allotment 2042 to its intersection with the eastern boundary of Block 300, OH(Kingoonya).  
Thence southerly and westerly along the eastern and southern boundaries of the said Block 300 to the south-eastern corner of Block 850, OH(Kingoonya).

Thence westerly, southerly and westerly along the southern boundaries of the said Block 850, including its production westerly across Stuart Highway, to the intersection with the western boundary of Block 436, OH(Kingoonya) and production westerly to the northern boundary of Section 169, OH(Kingoonya).

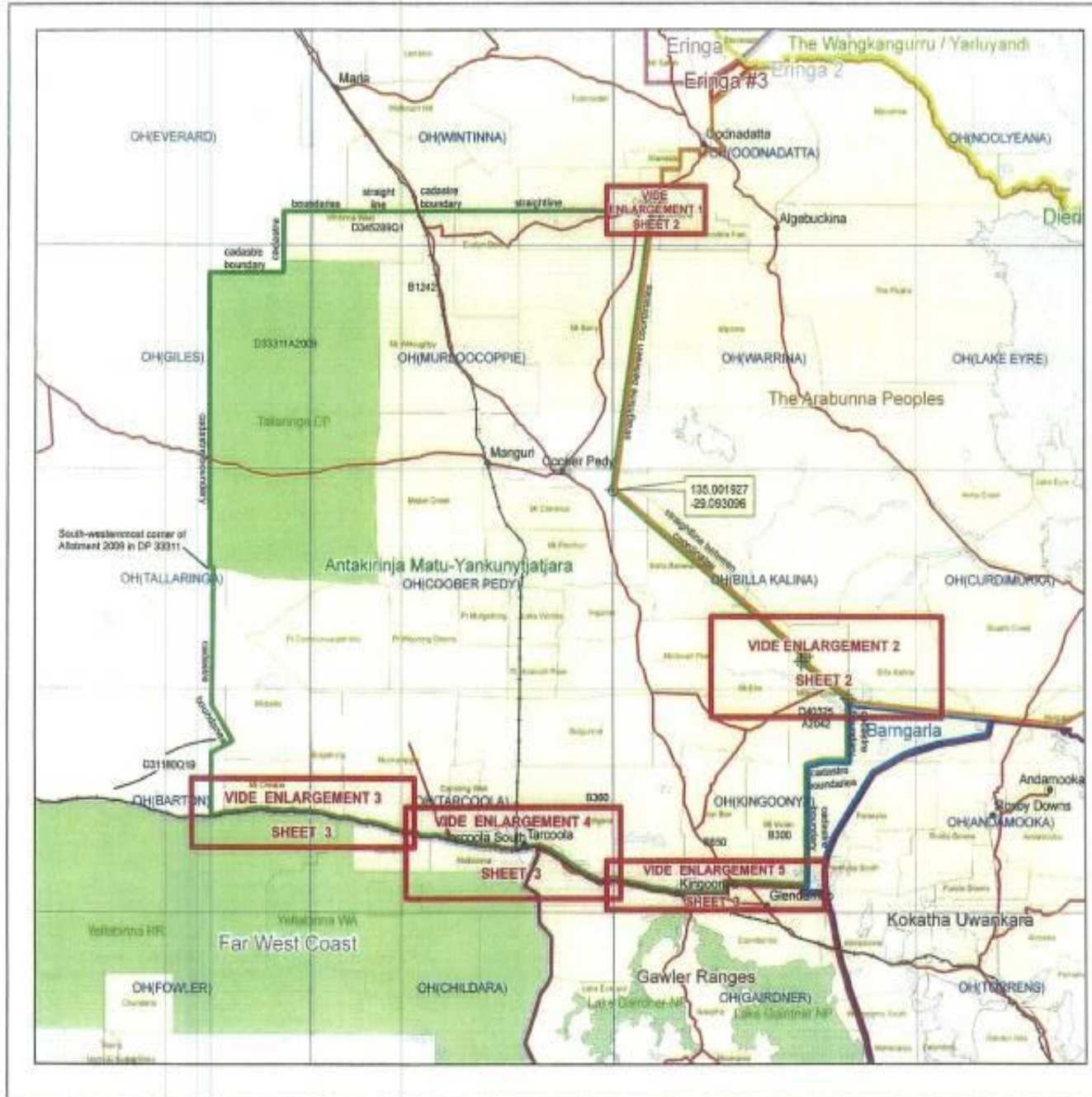
Thence generally westerly or north-westerly along the northern boundaries of Sections 169, 170, OH(Kingoonya); Allotment 54 in FP 217137; Sections 172 & 173, OH(Tarcoola); Allotment 10 in DP 57143; Sections 175, 176, 178, 179 & 182, OH(Tarcoola); Allotment 51 in FP 217137; Section 186, OH(Barton & Tarcoola); Sections 187, 188 & 189, OH(Barton), (the northern boundary of portion of the Trans-Australian Railway corridor) to its intersection with the eastern boundary of Allotment 15 in DP 31180. Thence northerly to the south-eastern corner of Piece 19 in DP 31180. Thence northerly, north-easterly, north-westerly, northerly & westerly along the eastern boundaries and northernmost boundary of the said Piece 19 to the point of commencement.

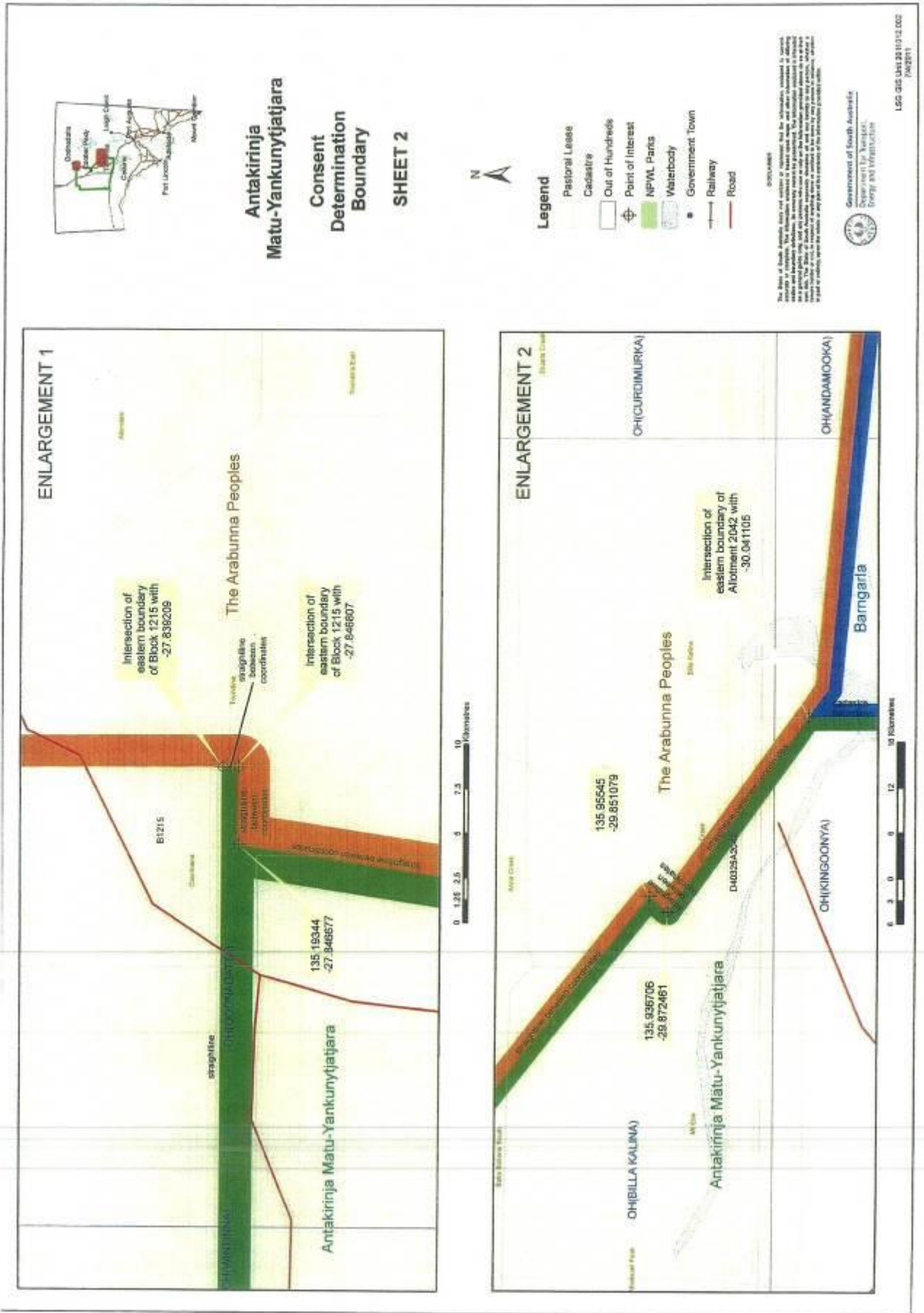
#### Reference datum

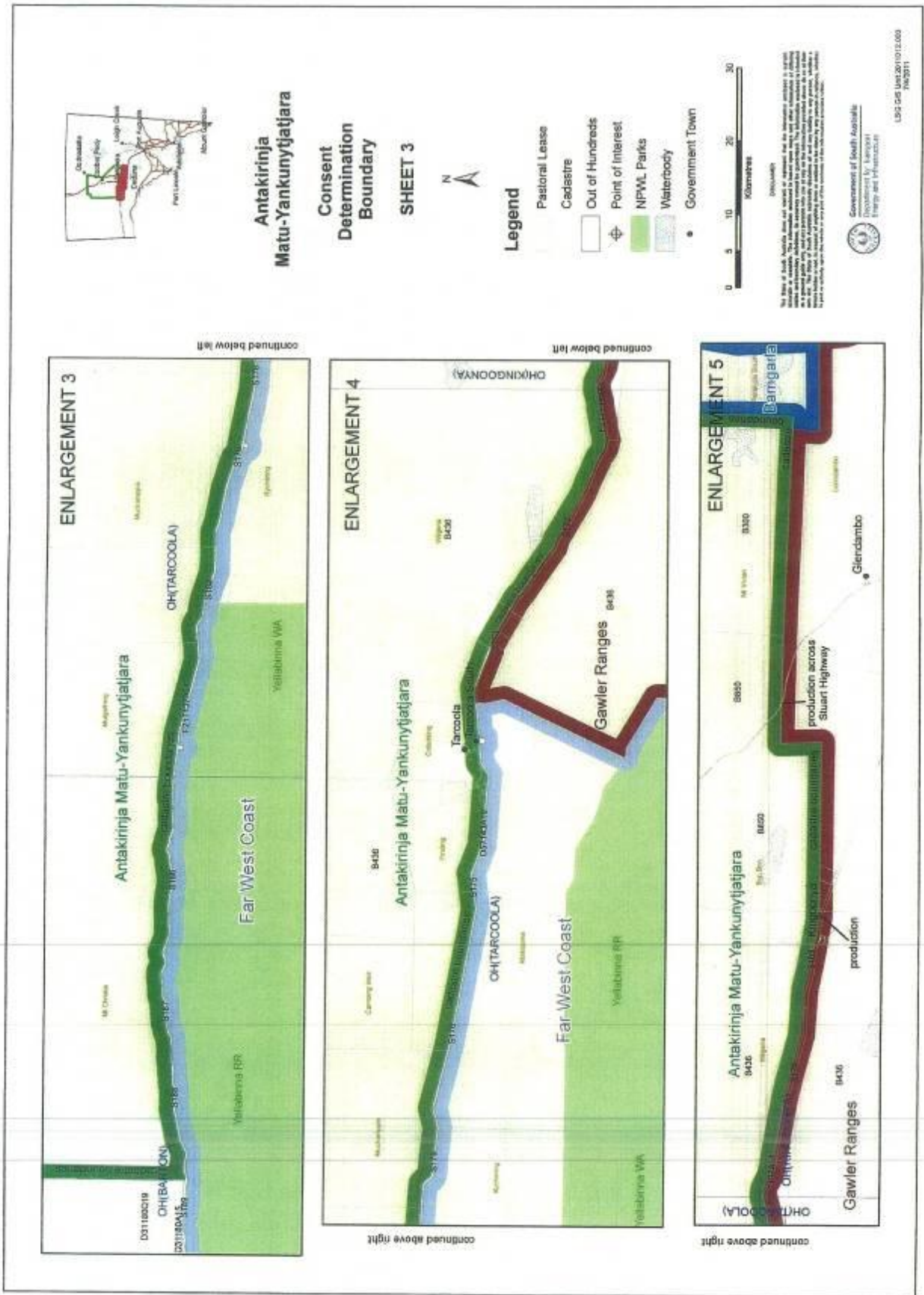
Geographical coordinates have been provided by the NNTT Geospatial Unit and are referenced to the Geocentric Datum of Australia 1994 (GDA94), in decimal degrees and are based on the spatial reference data acquired from the various custodians at the time.

The Court notes that the parties contemplate an Indigenous Land Use Agreement or Indigenous Land Use Agreements pursuant to which future surrender can occur within the Determination Area.

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







**SCHEDULE 3 – Areas within the external boundaries of the Determination Area which are excluded from the Determination Area because native title has been extinguished**

The following areas are agreed to have been excluded from the Determination Area because native title has been extinguished in those areas:

1. Save for those areas listed in *Schedule 5*, any areas in relation to which native title has been extinguished 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 attributable to the State of South Australia other than “excepted acts”);
2. Save for those areas listed in *Schedule 5*, any areas in relation to which native title has been extinguished 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 attributable to the Commonwealth of Australia).
3. All roads which have been delineated in a public map pursuant to section 5(d)(II) of the *Crown Lands Act 1929 (SA)*.
4. Save for those areas listed in *Schedule 5*, any area in which native title rights and interests have otherwise been wholly extinguished.
5. For the avoidance of doubt and without limiting the above, native title has been extinguished in the following areas:
  - 5.1. The Stuart Highway Corridor;
  - 5.2. The Adelaide Darwin Railway Corridor;
  - 5.3. The former Stuart Highway Corridor;
  - 5.4. All public roads;
  - 5.5. Cadney Park Roadhouse (A69 DP 45289, CT 5401/361);
  - 5.6. Copper Hill Miscellaneous Lease (CL 1644/11); and
  - 5.7. Commonwealth land being Section 466, OH (CT 5489/317).

**SCHEDULE 4 - Areas where the non-extinguishment principle applies by reason of a Vesting**

<b>Park name</b>	<b>Legislation proclaimed under</b>	<b>Reference</b>
Tallaringa Conservation Park	<i>National Parks &amp; Wildlife Act 1972</i>	Gazettal 22.12.1988

**SCHEDULE 5 - Areas where extinguishment of native title must be disregarded**

**47A Tenures**

<b>Current holder</b>	<b>Current Title</b>	<b>Tenure description</b>
Aboriginal Lands Trust	CT 5581/257	S 8, H832800
Cooper Pedy Aboriginal Housing Society Inc	CT 5370/179	S 1257, H832800
Cooper Pedy Aboriginal Housing Society Inc	CT 5370/179	A 1430, T832801
Cooper Pedy Aboriginal Housing Society Inc	CT 5601/238	A 291, T832801
Cooper Pedy Aboriginal Housing Society Inc	CT 5982/170	A 1143, T832801
Cooper Pedy Aboriginal Housing Society Inc	CT 5601/239	A 245, T832801
Umoona Aged Care Aboriginal Corp. Inc	CR 5856/785	A 2261, D56810

**47B Tenures**

The Parties agree that, for the purposes of this Consent Determination, section 47B applies to the following land parcels except any portion of the parcel which, at the date the determination was made -

- was covered by a licence issued under the *Crown Lands Act 1929* (SA) or the *Crown Land Management Act 2009* (SA); or
- was covered by any tenement issued under the *Opal Mining Act 1995* (SA); or
- which falls outside of the Determination Area; or
- which falls within the Woomera Prohibited Area, as identified in Clause 16(i) above.

<b>Area</b>	<b>Current Title</b>	<b>Tenure description</b>
Cooper Pedy Local Government Area	CR 5750/621	A 2142, D41067
Cooper Pedy Local Government Area	CR 5859/975	A 2267, D57429
Cooper Pedy Local Government Area	CR 5763/709	A 1717, D25330
Cooper Pedy Local Government Area	CR 5363/710	A 1718, D25330
Cooper Pedy Local Government Area	CR 5763/737	A 758, D 28631
Cooper Pedy Local Government Area	CR 5750/543	A10, D30943

<b>Area</b>	<b>Current Title</b>	<b>Tenure description</b>
Cooper Pedy Local Government Area	CR 5763/753	A 1864, D31334
Cooper Pedy Local Government Area	CR 5748/764	A 1980, D35117
Cooper Pedy Local Government Area	CR 5499/927	A 2192, D47965
Cooper Pedy Local Government Area	CR 6008/67	A 15, D74942
Cooper Pedy Local Government Area	CR 5627/89	A 2056, F40339
Cooper Pedy Local Government Area	CR 5748/292	A 2061, F40339
Cooper Pedy Local Government Area	CR 5748/293	A 2063, F40339
Cooper Pedy Local Government Area	CR 5748/294	A 2064, F40339
Cooper Pedy Local Government Area	CR 5748/796	A 2086, F40341
Cooper Pedy Local Government Area	CR 5748/805	A 2089, F40343
Cooper Pedy Local Government Area	CR 5748/806	A 2090, F40343
Cooper Pedy Local Government Area	CR 5748/808	A 2092, F40343
Cooper Pedy Local Government Area	CR 5771/710	A 1233, T832801
Cooper Pedy Local Government Area	CR 5771/737	A 1484, T832801
Cooper Pedy Local Government Area	CR 5771/738	A 1485, T832801
Cooper Pedy Local Government Area	CR 5771/739	A 1486, T832801
Cooper Pedy Local Government Area	CR 5763/775	A 1964, D35115
Cooper Pedy Local Government Area	CR 5748/784	A 1994, D35595
Cooper Pedy Local Government Area	CR 5748/785	A 2007, D35595
Cooper Pedy Local Government Area	CR 6020/785	S 780, H832800
Cooper Pedy Local Government Area	CR 5771/692	S 1138, H832800
Cooper Pedy Local Government Area	CR 5771/693	S 1274, H832800
Cooper Pedy Local Government Area	CR 5771/694	S 1484, H832800
Cooper Pedy Local Government Area	CR 5771/695	S 1543, H832800
Cooper Pedy Local Government Area	CR 5741/506	A 2255, D52818
Cooper Pedy Local Government Area	CR 5963/294	Q 1, D68210
Cooper Pedy Local Government Area	CR 5750/626	Q 52, D42426
Cooper Pedy Local Government Area	CR 5750/626	Q 53, D42426
Cooper Pedy Local Government Area	CR 5750/626	Q 54, D42426
Cooper Pedy Local Government Area	CR 5343/414	A 13, D44579
Cooper Pedy Local Government Area	CR 5750/613	A 2012, D38761

<b>Area</b>	<b>Current Title</b>	<b>Tenure description</b>
Cooper Pedy Local Government Area	CR 5356/581	A 2214, D45229
Cooper Pedy Local Government Area	CR 5936/478	Q 3, D56344
Cooper Pedy Local Government Area	CR 5763/591	S 756, H832000
Tarcoola area	CR 5764/537	S 1198, H833600
Tarcoola area	CR 5764/538	S 1199, H833600
Tarcoola area	CR 5764/539	S 1201, H833600
Tarcoola area	CR 5764/540	S 1203, H833600
Tarcoola area	CR 5750/379	S 1219, H833600
Tarcoola area	CR 5747/880	S 1200, H833600
Other areas	CR 5564/911	A 21, F39844
Other areas	CR 5763/588	S 1175, H831200
Other areas	CR 5986/952	A 1, F42266

**SCHEDULE 6 - Details of Aboriginal-held other rights and interests**

The following pastoral leases:

<b>Lease name</b>	<b>Pastoral Lease No</b>	<b>Crown Lease</b>
Mabel Creek	PE2527A	Volume 1629 Folio 19
Mount Clarence	PE2508	Volume 1597 Folio 74
Mount Willoughby	PE2515	Volume 1595 Folio 92

**SCHEDULE 7 - Details of Registered, or anticipated to be Registered Indigenous Land Use Agreements in the Determination Area**

1. The Minerals Exploration ILUAs between the Attorney-General for the State of South Australia, the Minister for Mineral Resources Development, the Antakirinja Matu-Yankunytjatjara native title claim group, the Antakirinja Matu-Yankunytjatjara Aboriginal Corporation, the Aboriginal Legal Rights Movement Inc, and South Australia Chamber of Mines and Energy Inc, registered on the Register of ILUAs on 18 May 2004 and on 14 June 2005;
2. Individual Pastoral ILUAs entered into or to be entered into between William Herbert Lennon Senior, Ian Crombie, David Brown and Jean Wood on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group and/or the Antakirinja Matu-Yankunytjatjara Aboriginal Corporation, the State of South Australia, and various pastoralists;
3. The Indigenous Land Use Agreement between William Herbert Lennon Senior, Ian Crombie, David Brown and Jean Wood on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group and/or the Antakirinja Matu-Yankunytjatjara Aboriginal Corporation and the State of South Australia and the District Council of Coober Pedy (Breakaways ILUA);
4. An Indigenous Land Use Agreement between William Herbert Lennon Senior, Ian Crombie, David Brown and Jean Wood on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group and/or the Antakirinja Matu-Yankunytjatjara Aboriginal Corporation and the State of South Australia (Tallaringa ILUA);
5. An Indigenous Land Use Agreement between William Herbert Lennon Senior, Ian Crombie, David Brown and Jean Wood on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group and/or the Antakirinja Matu-Yankunytjatjara Aboriginal Corporation and the State of South Australia (Whole of Claim ILUA).
6. An Indigenous Land Use Agreement between William Herbert Lennon Senior, Ian Crombie, David Brown and Jean Wood on behalf of the Antakirinja Matu-Yankunytjatjara Native Title Claim Group and/or the Antakirinja Matu-Yankunytjatjara Aboriginal

Corporation and the State of South Australia and the District Council of Coober Pedy (Coober Pedy ILUA).

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.  
The text of entered orders can be located using Federal Law Search on the Court's website.

**IN THE FEDERAL COURT OF AUSTRALIA  
SOUTH AUSTRALIA DISTRICT REGISTRY  
GENERAL DIVISION**

**SAD 6007 of 1998**

**BETWEEN:**                **WILLIAM HERBERT LENNON SNR, IAN CROMBIE,  
DAVID BROWN AND JEAN WOOD ON BEHALF OF THE  
ANTAKIRINJA MATU-YANKUNYTJATJARA NATIVE  
TITLE CLAIM GROUP**  
**Applicants**

**AND:**                    **THE STATE OF SOUTH AUSTRALIA AND OTHERS**  
**Respondents**

**JUDGE:**                **MANSFIELD J**

**DATE:**                **11 MAY 2011**

**PLACE:**                **ADELAIDE**

**REASONS FOR JUDGMENT**

1                This is an important day.

2                The preamble to the *Native Title Act 1993* (Cth) (the NT Act) recognised, on behalf of all the people of Australia, that the Aboriginal peoples of Australia inhabited this country for many many years prior to European settlement, and that the Aboriginal peoples had been progressively dispossessed of their lands. It recorded that, by the overwhelming vote of the people of Australia, the Constitution was amended to enable laws such as the NT Act to be passed, to facilitate the recognition by our shared legal system of the native title rights and interests in their land. This is an occasion when the Court is to make an order declaring that the Antakirinja Matu-Yankunytjatjara people were and are the traditional owners of the land we are on. We are collectively recognising their status. It important to emphasise that we are not granting that status, but declaring that it exists and has always existed at least since European settlement. The determination is made with the consent of the State of South Australia and all the respondents whose interests might be affected by the orders to be made today. It is therefore an occasion for us all to celebrate.

3                The application for determination that the Antakirinja Matu-Yankunytjatjara group had native title over the claim area was made a long time ago, in 1995. It was amended in October

2009 to slightly reduce its eastern boundary to avoid the claim area overlapping with that of the Arabunna Peoples claim. Its recognition has taken a long time.

4           The NT Act imposes requirements, particularly under ss 87, 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 Queensland)* (2001) 115 FCR 109.

### **Whether the proposed consent determination should be made**

5           There are some formal requirements. Section 87 of the NT Act sets out the Court's power to make orders sought by the consent of the parties. The application for a determination over the whole area of the Antakirinja Matu-Yankunyjtjajara Claim is pursuant to s 87 of the NT Act. It requires the period of notice under s 66 to have elapsed. It has clearly done so. Section 87 requires that a signed copy of the agreed orders has been filed with the Court. That too has been done.

6           I am satisfied that each of the requirements or pre-conditions to the making of the proposed orders has been made.

7           It is necessary to go beyond the formal requirements of the NT Act. Under s 87, in order to make the proposed consent determination of native title without holding a hearing, the Court must be satisfied that such order would be within its power and that it would be appropriate to do so.

8           Because the orders seek a determination of native title, they must comply with s 94A of the NT Act. That section requires the proposed orders to set out details of the matters mentioned in s 225 of the NT Act. 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 interest confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

9 “Native title rights and interests” are defined in s 223(1) of the NT Act as:

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

10 The evidence in this matter included a Native Title Report and a later supplementary report by Dr Lee Sackett (the Sackett Reports). These reports consisted of two volumes totalling 314 pages and contained detailed genealogies, first-hand statements from claimants, as well as Dr Sackett’s own observations. Dr Lee Sackett is an anthropologist with many years’ experience working in the Western Desert region (and elsewhere) and extensive experience of working under native title legislation. Further evidence was included in a DVD prepared by ethnographic film-maker Dahlia Abdel-Aziz.

11 The State’s then in-house anthropologist, Kim McCaul, was involved in negotiations to resolve the claim overlap with the Arabunna claimants and made further enquiries of claimants at that time.

12 The State also compiled a number of documents and maps setting out the birthplaces and burial places mentioned in the genealogies, both within and outside of the Determination area.

13 Dr Scott Cane, the State’s consultant anthropologist, independently assessed the evidence. Dr Cane has had extensive experience in both the Western Desert region and in native title claims. Having previously prepared the expert report for the claimants in the

neighbouring Yankunytjatjara/Antakirinja claim, he is well aware of both the ethnography and the contemporary position in the general area of this claim.

14           On the basis of all of the evidence, the Court is satisfied that the requirements of ss 223 and 225 have been satisfied.

15           Each of the respondents have received a position paper explaining the basis for the State's view and have 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 NT Act.

16           It is important that I should explain why the Court itself is satisfied of those matters. The evidence must show that there is a recognisable group or society that presently recognises and observes traditional laws and customs in the Determination area. In defining that group or society, the following must also be addressed:

1.       That the claim group comprises a society united in and by their acknowledgment and observance of a body of accepted laws and customs; and
2.       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
3.       That the acknowledgment 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 acknowledgment and observance of those laws and customs; and
4.       That the claim group 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 *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; *Risk v Northern Territory* (2006) FCA 404; *Western Australia v Ward* (2002) 213 CLR 1.

#### **The relevant society for the purposes of s 223 of the NT Act**

17           The applicant identifies with a broad range of identity labels, which designate sub-groupings of the larger Western Desert society to which the claim group belongs, including:

1. Antakirinja;
2. Kokatha;
3. Martu;
4. Martutjara;
5. Martu-Yankunytjatjara;
6. Mulatjara; and
7. Yankunytjatjara

18 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 Western Desert and is well-documented in the anthropological literature about the region.

19 The relevant society to which the claimants belong is the Western Desert Social and Cultural Bloc (WDB). The WDB has been well-documented by anthropologists (see eg R Berndt, “The concept of the tribe in the Western Desert of Australia”, *Oceania* 30 (2): 81-107 1959) and has been recognised in numerous Federal Court decisions (see eg *James on behalf of the Martu People v Western Australia* [2002] FCA 1208; *Jango v Northern Territory* [2006] FCA 318; *De Rose v State of South Australia (No 2)* (2005) 145 FCR 290 (*De Rose*)).

20 The claimants’ membership of that society is reflected through their language, kinship system, ceremonies and marriage rules among other factors. The Sackett Reports clearly show that.

21 I am satisfied that the level of detail provided by the applicant to identify the native title claim group and its society satisfies the requirements of the NT Act.

**The relationship between the claim group’s society and the society in the Determination Area at sovereignty**

22 The relevant date of sovereignty for the vast majority of this area is 1788 although over some parts in the west of the claim area sovereignty was claimed in 1825. I agree with the parties that it is appropriate to infer connection from the earliest records of contact. The Sackett Reports detail the claimants’ links to presumed individual native title holders at sovereignty and dealt with the claimants’ links to the WDB. They also provide a detailed summary of the work of earlier researchers on the people and country of the claim area, together with genealogies of 21 families.

23 Concerns as to the area of the claim formerly overlapped by Arabunna were also resolved to the satisfaction of Dr Cane.

24 On the basis of the information contained in the evidence and for the purposes of a consent determination, I am satisfied that the contemporary Antakirinja Matu-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?**

25 The relevant laws and customs are those of the WDB, which have been well documented in the ethnographic literature. One or more varieties of the Western Desert language are widely spoken among the claimants, including children, and the claimants' kinship system still defines and regulates relationships between individuals.

26 Ceremonial activity continues to take place on the claim area. There clearly is significant weight placed on religious information, access to which is restricted according to both gender and seniority. Elders, in particular men and women with spiritual knowledge and experience, continue to play key roles in the traditional authority, structure and decision-making processes of the society.

27 Dr Cane, in his report, found that the "existence of highly sacred men's laws ... points to the existence of vital traditions and ... indicates ... extant vitality of ritual traditions in the claim area".

28 Other practical aspects of law and custom for which there is contemporary evidence, especially as recorded in the Sackett Reports include:

- (1) general bush tucker usage;
- (2) the traditional manner of preparing kangaroo;
- (3) physically maintaining and protecting sites of significance; and
- (4) beliefs in spirits in the land and consequent behaviour.

29 On the basis of that evidence, I am satisfied that a not insignificant number of the claimants 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**

30 There is abundant evidence that the claim group is constituted of Western Desert people who have had long-term, multi-generational association with this area via a number of avenues:

1. the Sackett Reports identify about 150 people across all of the genealogies who were born on or in the immediate vicinity of the claim area at locations spread across all of the area;
2. there are at least 26 recorded burials on the claim area, most at the Coober Pedy cemetery;
3. many of the claimants have grown up and spent most of their adult life on the claim area; and
4. a significant number of men and women seem to know Dreaming stories, songs, and related sites on the area.

31 The case law has recognised that members of the WDB have rights in a given area via multiple pathways.

32 There is strong evidence for the existence of a system that allows claimants to identify who does and does not have rights in the area. This Court has repeatedly emphasised that in a communal claim of this nature, it is appropriate (once a mechanism for identification of the claim group has been determined) for the native title community itself to deal intramurally with the allocation of rights within that community and according to those defined mechanisms: see eg *Northern Territory v Alyawarr* (2005) 145 FCR 442 at [114].

33 The existence of multiple pathways to gaining rights and interests in land within the WDB has long been recognised in the literature and has a sound practical basis in an area where survival was always difficult. Despite significant interaction of claimants with the dominant Anglo-Australian society, I am satisfied that there is sufficient evidence of continued connection 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 applicant**

34 The Sackett Reports clearly provide detailed evidence in support of each of the rights and interests set out in paragraph 4 of the Determination. In commencing that section of his report, Dr Sackett stated:

[In this Chapter], I consider the intertwined issues of how claimants see their rights,

interests and responsibilities in country as having arisen, and how traditional laws and customs regulate the exercise of claimants' rights, interests and responsibilities.

35           These rights are strongly linked to those included by the Full Federal Court in the De Rose Hill determination, informed through negotiations between legal representatives at case management conferences during the Draft CD Project and by more recent judgments.

36           The right to access and move around the claim area is addressed by reference to claimants' assertions about their belonging to the place and by the reference to restrictions attaching to the exploration of certain places.

37           Dr Sackett also sets out evidence given by named members of the claim group that they hunt and have hunted in the past on the claim area. There is evidence of traditional water gathering, knowledge of water locations, bush tucker gathering and traditional food preparation, as well as traditional cooking and fire preparation.

38           Dr Sackett's reports set out evidence of the practice of rituals associated with birth and death.

39           Current ceremonial activity within the claim group is addressed by Dr Sackett, including initiation, and men's and women's ceremonies, reflecting the ethnographic material. The evidence suggests a reducing but surviving tradition with its roots in the distant past.

40           Examples of traditional knowledge having been passed on to claimants and in turn, being passed on to future generations has been set out in the evidence. The evidence shows that this is linked to the land within the claim area.

41           Evidence has been provided to support the applicant's right to look after places of significance, protect special places, and to look after country. Dr Sackett noted comments made by Dr Cane that in the WDB, protecting sites is more about protecting the *tjukurpa*, damage to the site being equivalent to damage to the Dreaming itself. In particular, I consider that the right reflected in paragraph 4(m) of the Determination has been found to be applicable in relation to members of wider societies like the WDB: see eg *Northern Territory v Alyawarr* (2005) 145 FCR 422 at [151].

42           I am satisfied that Antakirinja Matu-Yankunytjatjara People practise all of the rights and interests included in the Determination.

### **Section 225 of the NT Act**

43 Section 225 of the NT Act governs what the Determination must include. I consider that the Determination complies with each requirement of s 225(a). Paragraph 3 of the Determination defines the group of native title holders and the criteria by which they have group membership. That reflects the evidence about relevant ancestors through whom individuals hold rights and interests in land. It also fulfils the requirements of s 61(4) of the NT Act as it is possible to ascertain whether any particular individual is within the native title claim.

44 Paragraphs 4 to 8 of the Determination set out the nature and extent of the native title rights and interests in the Determination area. Schedule 3 lists areas which have been excluded from the Determination area, in the case of Parts 1-4 of that schedule, by reason of the generic exclusion by the applicant from the application of any area over which native title has been extinguished. Other areas have been specifically excluded in Part 5 of Schedule 3 for the avoidance of doubt.

45 Paragraphs 9-16 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 applicant and the State and various respondents. There has been ample opportunity for any other interest-holders in the area to identify themselves and join as parties to the claim. The State's comprehensive tenure searches have not identified any other relevant interests holders in the area.

46 Paragraph 17 of the Determination describes the relationship between the native title rights in paragraphs 4 to 8 and those other rights in paragraphs 9 to 16.

47 Most of the Determination area is wholly covered by non-exclusive pastoral leases. The only areas of exclusive native title, by reason of the application of ss 47A and 47B of the NT Act are identified in Schedule 5 and described in paragraph 7 of the Determination. These areas represent a compromise by the applicant and the State reached in the negotiations for the consent determination.

### **Other matters**

48 The Antakirinja Matu-Yankunytjatjara claim was first lodged in November 1995 over a slightly larger area of land than the current Determination area. The claim was amended on 8 October 2009 to withdraw the eastern boundary slightly to accord with an agreement reached

with the neighbouring (and, until then, overlapping) Arabunna claim. The Arabunna pulled back their boundary at the same time, removing any overlap.

49           The application which provides the action number for the current proceeding was first lodged on 30 September 1998 and notification by the National Native Title Tribunal under s 66 of the NT Act (using current tenure data provided by the State) last closed on 6 January 1997. I am satisfied that all relevant interest holders in the area have had an opportunity to take part in the proceeding.

50           Apart from three minor respondents, all parties have had independent and competent legal advice in the proceeding. There is no reason to believe that the lack of representation of those unrepresented parties will have disadvantaged them such that a final determination should not be made.

51           The Determination area in Schedule 1 to the Determination contains a detailed description of the claim area. No areas are specifically excluded, but surrender of certain areas will be included in the separate ILUA negotiations.

52           Section 87 of the NT 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 by the applicant for the reasons set out above.

53           A tenure history of the claim area was provided by the State, and made available to all the parties to the claim. 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 Determination.

54           I note that as Coober Pedy is to be dealt with in a separate ILUA, there is no need to inquire further into that question at this stage. Much of the remainder of the claim area 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 rights of the claimants co-exist with those of the pastoralists. In line with the decision of the Full Court of the Federal Court in *De Rose* and subsequent consent determinations in this State, paragraph 10 of the Determination recognises the extinguishment of native title rights and interests over the pastoral leases within the Determination area, where

exclusive possession-style improvements authorised by the pastoral leases have been constructed.

55 I record that due to disagreement on whether the Full Court judgment in *De Rose* held that all future pastoral improvements occurring after the date of the consent determination extinguish native title, paragraph 11 of the Determination has been drafted to cover the position until the law in relation to future improvements is settled.

56 **Extinguishment of native title rights and interests in the Determination area by reason of the construction of public works is provided for in paragraphs 13 and 14 of the Determination. These paragraphs provide 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 Part 2 Division 3 of the NT Act to determine the effect of those public works constructed, established or situated after 23 December 1996.** There is some disagreement between the State and the applicant as to the effect of public works where notification has not occurred as required by the NT Act. If the issue arises at a later stage with regard to a particular public work, the liberty to apply provision in paragraph 21 will allow the issue to be aired before the Court for decision.

**Conclusion**

57 The NT Act, particularly with recent amendments as recognised by this 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 Antakirinja Matu-Yankunytjatjara People in this area.

I certify that the preceding fifty-seven (57) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mansfield.

Associate:

Dated: 11 May 2011

