National Native Title Tribunal

Registration test decision

(Edited for NNTT web publication 5 April 2011)

Application name	Adnyamathanha #3
Name of applicant	Russell Coulthard and Alwyn Hamilton McKenzie
State/territory/region	South Australia
NNTT file no.	SC10/1
Federal Court of Australia file no.	SAD69/10
Date application made	18 May 2010
Date application last amended	2 December 2010
Name of delegate	Cobey Taggart

I have considered this claim for registration against each of the conditions contained in ss. 190B and 190C of the *Native Title Act 1993* (Cth).

For the reasons attached, I am satisfied that each of the conditions contained in ss. 190B and C are met. I accept this claim for registration pursuant to s. 190A of the *Native Title Act 1993* (Cth).

Date of decision: 11 March 2011

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Cobey Taggart

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the ***Native Title Act 1993*** (Cth) under an i**nstrument of delegation dated** 2 August 2010 and made **pursuant to s. 99 of the Act.**

Reasons for decision

Table of contents

Introduction ... 4
Application overview ... 4
Registration test ... 4
Information considered when making the decision ... 5
Procedural fairness steps ... 5
Procedural and other conditions: s. 190C ... 7
Subsection 190C(2) Information etc. required by ss. 61 and 62 ... 7
Native title claim group: s. 61(1) ... 7
Name and address for service: s. 61(3) ... 8
Native title claim group named/described: s. 61(4) ... 8
Affidavits in prescribed form: s. 62(1)(a) ... 8
Application contains details required by s. 62(2): s. 62(1)(b) ... 10
Information about the boundaries of the area: s. 62(2)(a) ... 10
Map of external boundaries of the area: s. 62(2)(b) ... 10
Searches: s. 62(2)(c) ... 10
Description of native title rights and interests: s. 62(2)(d) ... 11
Description of factual basis: s. 62(2)(e) ... 11
Activities: s. 62(2)(f) ... 12
Other applications: s. 62(2)(g) ... 12
Section 24MD(6B)(c) notices: s. 62(2)(ga) ... 13
Section 29 notices: s. 62(2)(h) ... 13
Subsection 190C(3) No common claimants in previous overlapping applications ... 13
Subsection 190C(4) Authorisation/certification ... 17
Merit conditions: s. 190B ... 23
Subsection 190B(2) Identification of area subject to native title ... 23
Subsection 190B(3) Identification of the native title claim group ... 24
Subsection 190B(4) Native title rights and interests identifiable ... 25
Subsection 190B(5) Factual basis for claimed native title ... 27
Reasons for s. 190B(5)(a) ... 28
Reasons for s. 190B(5)(b) ... 32
Reasons for s. 190B(5)(c) ... 36
Subsection 190B(6) Prima facie case ... 36
Subsection 190B(7) Traditional physical connection ... 41
Subsection 190B(8) No failure to comply with s. 61A ... 42
Reasons for s. 61A(1) ... 43
Reasons for s. 61A(2) ... 43

Reasons for s. 61A(3) 43
Subsection 190B(9) No extinguishment etc. of claimed native title 44
Reasons for s. 190B(9)(a): 44
Reasons for s. 190B(9)(b) 44
Result for s. 190B(9)(c) 44
Attachment A Summary of registration test result 45

Introduction

This document sets out my reasons, as the Native Title Registrar's ('Registrar') delegate, for the decision to accept the application for registration pursuant to s. 190A of the Act.

Note: All references in these reasons to legislative sections refer to the *Native Title Act 1993* (Cth) ('the Act'), as in force on the day this decision is made, unless otherwise specified. Please refer to the Act for the exact wording of each condition.

Application overview

The Adnyamathanha #3 claimant application ('the application') was filed in the Federal Court of Australia ('the Court') on 18 May 2010. The Registrar of the Federal Court of Australia (the Court) gave a copy of the application to the Registrar on 24 May 2010 pursuant to s. 63 of the Act. This triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

As part of that consideration, a preliminary assessment was provided to the applicant on 28 June 2010. That preliminary assessment outlined the delegate's preliminary view that the application, in its then current form, would likely not satisfy the requirements of the registration test. When the preliminary assessment was provide to the applicant, it was requested that if any further information or amendment to the application were to be made, that it be completed by 19 July 2010. This was later changed to 31 August 2010 upon request of the applicant.

On 31 August 2010 the applicant (through its legal representative) filed an amended application and Notice of Motion to amend the application. On 1 September 2010 the applicant (but not the Court) provided a stamped copy of the Notice of Motion and proposed amended application to the Registrar.

The Registrar's power to apply the registration test arises under s. 190A and will only be triggered where the Court provides a copy of the application to the Registrar pursuant to s. 63 or s. 64(4) of the Act. Accordingly, the Registrar could not consider the application in its form as filed on 31 August 2010 if and until a copy of that application was provided by the Court. As there had been a filed application and Notice of Motion to amend the application filed on 18 May 2010, the registration test was not applied to that form of the application.

On 2 December 2010 the Court gave a copy of the amended application to the Registrar pursuant to s. 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the amended application under s. 190A of the Act.

I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim as it is an essential condition for each of those subsections that the application be entered onto the Register of Native Title Claims ('Register') and the application is not entered on the Register.

Therefore, in accordance with subsection 190A(6) I must accept the claim for registration if it satisfies all of the conditions in 190B and 190C of the Act. This is commonly referred to as the registration test.

Registration test

Section 190B sets out conditions that test particular merits of the claim for native title. Section 190C sets out conditions about 'procedural and other matters'. Included among the procedural conditions is a requirement that the application must contain certain specified information and documents. In my reasons below I consider the s. 190C requirements first, in order to assess whether the application contains the information and documents required by s. 190C *before* turning to questions regarding the merit of that material for the purposes of s. 190B.

Pursuant to ss. 190A(6) and (6B), the claim in the application must be accepted for registration because it does satisfy all of the conditions in ss. 190B and 190C. A summary of the result for each condition is provided at Attachment A.

Information considered when making the decision

In making this decision I have had regard to the application and other documents as filed by the applicant with this application. I have also had regard to documents contained in the National Native Title Tribunal's ('Tribunal') case management/delegate's file SC10/1 (also known as 2010/01197). Where I have had particular regard to information in documents contained within that file, I have identified them in this statement of reasons. In particular, this includes information which was provided by the applicant directly to the Registrar (see my reasons regarding s. 190B(5) for a detailed description of this information).

I have *not* considered any information that may have been provided to the Tribunal in the course of the Tribunal providing assistance under ss. 24BF, 24CF, 24CI, 24DG, 24DJ, 31, 44B, 44F, 86F or 203BK, without the prior written consent of the person who provided the Tribunal with that information, either in relation to this claimant application or any other claimant application or any other type of application, as required of me under the Act.

Also, I have *not* considered any information that may have been provided to the Tribunal in the course of its mediation functions in relation to this or any other claimant application. I take this approach because matters disclosed in mediation are 'without prejudice' (see s. 136A of the Act). Further, mediation is private as between the parties and is also generally confidential (see also ss. 136E and 136F).

Procedural fairness steps

As a delegate of the Registrar and as a Commonwealth Officer, when I make my decision about whether or not to accept this application for registration I am bound by the principles of administrative law, including the rules of procedural fairness, which seek to ensure that decisions are made in a fair, just and unbiased way. I note that the common law duty to afford procedural fairness may be excluded by express terms of the statute under which the administrative decision is made or by any necessary implication: *Hazelbane v Doepel* [2008] FCA 290 —at [23] to [31]. The steps that I and other officers of the Tribunal have undertaken to ensure procedural fairness is observed, are as follows:

- The State of South Australia is entitled to procedural fairness: see *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 —at [21] to [38]. In this regard the Tribunal wrote to the South Australian government advising that the Registrar had received a copy of the amended application and was required to apply the registration test and further that the Registrar had received additional information from the applicant for consideration in the

application of the registration test, which, the Tribunal understood, the South Australian government was already in possession of (the specific information before the Tribunal was outlined to the South Australian government).The South Australian government was provided with an opportunity to make comment or submission before the registration test was applied to the amended application.

- The Tribunal also wrote to the applicant's legal representative to confirm the information which the applicant had either provided or wished the delegate to consider when applying the registration test. Within this correspondence the applicant was made aware of the my preliminary view that the State of South Australia would be provided with, or informed about, the additional information without any confidentiality obligations being imposed. The reasons for this view were explained to the applicant's representative, who confirmed that they shared my view in this regard. Copies of this correspondence, and the applicant's reply, have been placed in the delegate's file to which I have referred previously.

Procedural and other conditions: s. 190C

Subsection 190C(2)

Information etc. required by ss. 61 and 62

> The Registrar/delegate must be satisfied that the application contains all details and other information, and is accompanied by any affidavit or other document, required by sections 61 and 62.

The application **satisfies** the condition of s. 190C(2), because it **does** contain all of the details and other information and documents required by ss. 61 and 62, as set out in the reasons below.

In reaching my decision for the condition in s. 190C(2), I understand that this condition is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2): *Attorney General of Northern Territory v Doepel* (2003) 133 FCR 112; [2003] FCA 1384 (*Doepel*) —at [16] and [35] to [39]. In other words, does the application contain the prescribed details and other information?

It is also my view that I need only consider those parts of ss. 61 and 62 which impose requirements relating to the application containing certain details and information or being accompanied by any affidavit or other document (as specified in s. 190C(2)). I therefore do not consider the requirements of s. 61(2), as it imposes no obligations of this nature in relation to the application. I am also of the view that I do not need to consider the requirements of s. 61(5). The matters in ss. 61(5)(a), (b) and (d) relating to the Court's prescribed form, filing in the Court and payment of fees, in my view, are matters for the Court. They do not, in my view, require any separate consideration by the Registrar. Paragraph 61(5)(c), which requires that the application contain such information as is prescribed, does not need to be considered by me under s. 190C(2), as I already test these things under s. 190C(2) where required by those parts of ss. 61 and 62 which actually identify the details/other information that must be in the application and the accompanying prescribed affidavit/documents.

My consideration of the particular parts of ss. 61 and 62 (which require the application to contain details/other information or to be accompanied by an affidavit or other documents) is detailed below:

Native title claim group: s. 61(1)

> The application must be made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.

The application contains all details and other information required by s. 61(1).

For the purpose of s. 61(1), I consider only whether the application contains information that the applicant is a member of the native title claim group who is authorised by all persons within that

group to make the application. I note that there is a limited exception to this procedural nature of s. 190C(2). This exception is limited to instances where it is apparent on the face of the application that members of the native title claim group have been excluded from the native title claim group description. In those instances it may be the case that s. 190C(2) in relation to s. 61(1) may not be satisfied: *Doepel* —at [35] and [46]; *Edward Landers v State of South Australia* [2003] FCA 264 —at [29] to [40].

Part A[2] of the application states:

> Specific authorisation for this application, and for the applicants to make this application, was given by the native title claim group at a special general meeting of Adnyamathanha Traditional Lands Association (Aboriginal Corporation) RNTBC on 13 March 2010.

A description of the native title claim group is provided at Schedule A of the application (which I have extracted within my reasons regarding s. 190B(3)). Further, Schedule R of the application states that the persons jointly comprising the applicant are members of the native title claim group. In my view, there is nothing on the face of the application which suggests that members of the native title claim group have been excluded from the native title claim group description.

As the application states that the native title claim group has authorised the applicant (who are themselves members of the claim group) to make this application and the application has provided a description of the members of that group I am satisfied that this requirement of s. 190C(2) has been met.

Name and address for service: s. 61(3)

> The application must state the name and address for service of the person who is, or persons who are, the applicant.

The application contains all details and other information required by s. 61(3).

Page 2 of the application provides the names of the persons who jointly comprise the applicant. Their address for service is provided at Part B of the application. As this information is provided in the application I am satisfied this requirement of s. 190C(2) has been met.

Native title claim group named/described: s. 61(4)

> The application must:
> (a) name the persons in the native title claim group, or
> (b) otherwise describe the persons in the native title claim group sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

The application contains all details and other information required by s. 61(4).

As I have noted above, Schedule A of the application, contains a description of the persons who comprise the native title claim group (see my reasons regarding s. 190B(3) which provides this description in full).

As the application does contain a description of the native title claim group I am satisfied that this requirement of s. 190C(2) has been met.

Affidavits in prescribed form: s. 62(1)(a)

> The application must be accompanied by an affidavit sworn by the applicant that:

(i) the applicant believes the native title rights and interests claimed by the native title claim group have not been extinguished in relation to any part of the area covered by the application, and
(ii) the applicant believes that none of the area covered by the application is also covered by an approved determination of native title, and
(iii) the applicant believes all of the statements made in the application are true, and
(iv) the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it, and
(v) setting out details of the process of decision-making complied with in authorising the applicant to make the application and to deal with matters arising in relation to it.

The application is accompanied by the affidavit required by s. 62(1)(a).

At the time this application was made (i.e. when it was first filed on 18 May 2010) the application was accompanied by affidavits sworn by each of the persons who comprise the applicant ('first affidavits'). Those affidavits were attached to the application and were therefore filed in the Court.

No affidavits were filed with, or attached to, the amended application. I understand that the applicant continues to rely on those affidavits which were filed with the original application. It is well settled that this is sufficient for the requirements of s. 62(1)(a): *Drury v State of Western Australia* [2000] FCA 132 —at [11]. Further, there is no requirement that such affidavits be attached to, or form part of, the application: *Doepel* —at [88]. Accordingly, I have had regard to the affidavits as filed in the original application when considering whether this requirement has been satisfied.

I have also had regard to a further affidavit jointly sworn by the persons comprising the applicant on 26 August 2010 and filed in the Court ('second affidavit'). That affidavit states that the first affidavits omitted to set out details of the relevant process of decision making complied with by the native title claim group when making decisions about authorising the application. The second affidavit is said to provide those details.

Other than personalised details, the first affidavits are largely identical and provide:

(a) that the applicant believes that the native title rights and interests claimed by the native title group have not been extinguished in relation to any part of the area covered by the application – see section 47A of the Native Title Act and 47 [the affidavit sworn by Russell Coulthard refers to s. 47A and s. 47B of the Act]; and
(b) that the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register; and
(c) that the applicant believes that all of the statements made in the application are true; and
(d) that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it; and
(e) stating the basis on which the applicant is authorised as mentioned in paragraph (d): by resolution of ATLA including in particular in April 2008 and on 13 March 2010 and of Viliwarinha Yura Aboriginal Corporation in or about July 2009.

The second affidavit provides information which details the process of decision making referred to in paragraph (e) of the first affidavit. The information provided in the second affidavit has been outlined within my reasons regarding s. 190C(4)(b) below. Accordingly, I do not consider it necessary to outline it here also.

As the affidavits contain the information required by s. 62(1)(a), are deposed by all persons comprising the applicant and accompany the application I am satisfied this requirement has been met.

Application contains details required by s. 62(2): s. 62(1)(b)

> The application must contain the details specified in s. 62(2).

The application contains all details and other information required by s. 62(1)(b).

The application does contain the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

Information about the boundaries of the area: s. 62(2)(a)

> The application must contain information, whether by physical description or otherwise, that enables the following boundaries to be identified:
> (i) the area covered by the application, and
> (ii) any areas within those boundaries that are not covered by the application.

The application contains all details and other information required by s. 62(2)(a).

Substituted Attachment B1 of the application contains a written description of the area of land and waters which are covered by the application. Attachment B2 of the application contains a description of the areas of land and water which are within the area described in Attachment B1 but which are not covered by the application.

I am therefore satisfied this requirement has been met.

Map of external boundaries of the area: s. 62(2)(b)

> The application must contain a map showing the boundaries of the area mentioned in s. 62(2)(a)(i).

The application contains all details and other information required by s. 62(2)(b).

Attachment C of the application contains a map which is asserted to show the boundaries of the area mentioned in s. 62(2)(a)(i) of the Act. I am therefore satisfied this requirement has been met.

Searches: s. 62(2)(c)

> The application must contain the details and results of all searches carried out by or on behalf of the native title claim group to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application.

The application contains all details and other information required by s. 62(2)(c).

Schedule C of the application states:

> Searches have disclosed the existence of the perpetual leases referred to in Attachment B1 and the Deed of Grant between the Indigenous Land Corporation and Viliwarinha Yura Aboriginal Corporation dated 5 February 2001 and associated caveat (Caveat No. 9058990) in favour of ILC.
>
> Searches of the Crown Records in paragraph 26) of Attachment B(1) have also been conducted.

Further information is provided in Schedule L of the application, which states:

> The land and waters in paragraphs 1) to 25) of Attachment B(1) are subject to the perpetual leases and "Aboriginal freehold" referred to in Schedule B. Viliwarinha Yura Aboriginal Corporation currently holds these leases and freehold.
>
> It is maintained that these parts of the Claim Area are, accordingly, held expressly for the benefit of Aboriginal People: s47A.
>
> The land and waters in paragraph 26) of Attachment B(1) are Crown Land. Some of these are Crown Land not covered by a reservation, proclamation, dedication, condition, permission or authority within the meaning of Section 47B of the *Native Title Act* 1993.

Attachment B1 identifies the land and waters which are covered by the application. Paragraphs 1 to 25 identify a series of land parcels variously identified as a perpetual lease (with specific lease numbers provided in each instance) or aboriginal freehold (with volume and folio information provided). Paragraph 26 states that any other land and waters which are within the external boundary of the area described in paragraphs 1 to 25 are also covered by the application. Specific parcels of land are then identified by reference to section numbers and volume and folio identifiers.

As the application does provide details and results of searches which were undertaken in relation to the land and waters covered by the application, it is my view the application satisfies this particular requirement of s. 190C(2).

Description of native title rights and interests: s. 62(2)(d)

> The application must contain a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

The application contains all details and other information required by. 62(2)(d).

Attachment E of the application contains a description of the native title rights and interests which are claimed in relation to particular land and waters, which is not merely a statement to the effect that the native title rights and interest are all those that may exist, or have not been extinguished, at law.

Accordingly, I am satisfied this requirement of s. 190C(2) is met.

Description of factual basis: s. 62(2)(e)

> The application must contain a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, and in particular that:
> (i) the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (ii) there exist traditional laws and customs that give rise to the claimed native title, and
> (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application contains all details and other information required by s. 62(2)(e).

As the wording of s. 62(2)(e) states, an applicant is required to provide a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist, having particular regard to the matters specified at s. 62(2)(e)(i) to (iii).

In *State of Queensland v Hutchison* [2001] FCA 416 (*Hutchison*) the Court (Kiefel J) observed that the requirement to provide a 'general description of the factual basis' would likely not be satisfied where the information within the application merely repeated the particular wording of subparagraphs (i), (ii) and (iii) —at [17]. In *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala #2 FC*) the Full Court (French, Moore and Lindgren JJ, as his Honour French J then was), found that s. 62(2)(e) required something more than assertions at a high level of generality —at [92].

Having regard to *Hutchison* and *Gudjala #2 FC* I understand that something more than assertions at a high level of generality are required to satisfy s. 62(2)(e). That is, the information must contain some specificity in relation to the native title claim group. Of course this understanding is within the wider context of s. 190C(2), which as I have previously explained, 'is confined to ensuring the application...contains what is required by ss. 61 and 62 ' and not the sufficiency of that information: *Doepel* —at [16], [35] and [37].

Attachment F of the application contains statements about the particular matters identified at s. 62(2)(e) of the Act. While general, those statements are specific to the native title claim group and are something more than a mere recitation of sub-paragraphs (i) to (iii). I am satisfied that the information is directed to each of those sub-paragraphs. Having regard to this information, I am satisfied that this particular requirement is met.

Activities: s. 62(2)(f)

> If the native title claim group currently carries out any activities in relation to the area claimed, the application must contain details of those activities.

The application contains all details and other information required by s. 62(2)(f).

Schedule G and Attachment G of the application provide information about activities currently carried out by the native title claim group in relation to the area claimed. Accordingly, I am satisfied this requirement has been satisfied.

Other applications: s. 62(2)(g)

> The application must contain details of any other applications to the High Court, Federal Court or a recognised state/territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or of compensation in relation to native title.

The application contains all details and other information required by s. 62(2)(g).

Attachment H of the application states:

> The claim area lies within the geographical boundaries of the Adnyamathanha #1 claim SG6001/98. Unless some part of the land and waters in paragraph 26) of Attachment B(1) is within that claim none of the claim area is included in that claim (SG6001/98), on the basis of Native Title extinguishment by virtue of previous exclusive possession acts (e.g. perpetual leases).

In my view the information above satisfies this particular requirement. It identifies the applicant's knowledge relating to the details of any application for a determination of native title (or a determination of compensation in relation to native title) which may cover some or all of the area covered by this application.

Section 24MD(6B)(c) notices: s. 62(2)(ga)

> The application must contain details of any notification under s. 24MD(6B)(c) of which the applicant is aware, that have been given and that relate to the whole or part of the area covered by the application.

The application contains all details and other information required by s. 62(2)(ga).

The application is entirely silent on this requirement. It neither confirms nor denies that the applicant is aware of any such notice being given. On the face of the application there is nothing to indicate that the applicant is aware of any notification made under s. 24MD(6B)(c) that has been given in relation to the area covered by the application.

The requirements of this section are that an applicant must provide details of particular notices of which it is aware. It does not require an applicant to deny knowledge of such notices. As a matter of practicality an applicant may choose to do so.

In my view, it is somewhat unhelpful that the applicant has not included a statement to the effect that the applicant is not aware of such notices being given. However in its absence, and in the absence of any information within the application which suggests that the applicant is aware of such a notice(s), the application does nonetheless satisfy this requirement of s. 190C(2).

Section 29 notices: s. 62(2)(h)

> The application must contain details of any notices given under s. 29 (or under a corresponding provision of a law of a state or territory) of which the applicant is aware that relate to the whole or a part of the area covered by the application.

The application contains all details and other information required by s. 62(2)(h).

Schedule I of the application states 'notices given are not known' in relation to notices made under s. 29 of the Act. In light of this statement, I am satisfied this requirement has been met.

Subsection 190C(3)
No common claimants in previous overlapping applications

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and

(c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

The application **satisfies** the condition of s. 190C(3).

The nature of the Registrar's task at s. 190C(3) is to consider whether there are members in common between the application being considered for registration (the current application) and a 'previous application'. An application will be a previous application where each of the conditions in subparagraphs (a) to (c) arises. Accordingly, where each of the conditions in s. 190C(3)(a) to (c) are satisfied in relation to a particular application, I must consider whether any member of the native title claim group in the current application was a member of a native title claim group in that previous application: *State of Western Australia v Strickland* [2000] FCA 652; (2000) 99 FCR 33 (*Strickland FC*) —at [9].

Was the current application overlapped by any other application for a determination of native title?

The first question I must consider is whether this application is covered by any other application for a determination of native title. In this instance, I cannot answer that question conclusively.

On the face of it, there is an overlap between this application and SAD 6001/98 — Adnyamathanha #1 —SC99/1. A geospatial assessment and overlap analysis indicates that the current application area is wholly covered by the Adnyamathanha #1 application. This assessment was prepared by the Tribunal's Geospatial Services on 10 December 2010 (geospatial report).

However, I understand that it is the applicant's belief, or perhaps intention, that there is no overlap between these applications. It would appear that the current application covers areas which are not covered by the Adnyamathanha #1 application, even though they are within the external boundary of that latter application.

Information about the land and waters covered by the current application

Attachment B1 of the application states the application area is wholly covered by areas where s. 47A and s. 47B of the Act are applicable. For reasons explained immediately below, it appears that those areas where s. 47A is said to be applicable, are not covered by the Adnyamathanha #1 application because at the time that application was made s. 47A did not apply to those specific areas.

In this regard, Schedule D of the application states that searches of these particular areas have disclosed, in part, the existence of a deed of grant between the Indigenous Land Corporation and Viliwarinha Yura Aboriginal Corporation dated 5 February 2001. I infer the applicant asserts that s. 47A became applicable to those particular areas at that time. Prior to that act, it is said those areas had been subject to previous exclusive possession acts (see Attachment H of the application).

In relation to the balance of the application area, where s. 47B is said to apply, the applicant's position is less clear. In particular, Attachment H of the application states that 'unless some part of the land and waters [where s. 47B is asserted to apply] is within [Adnyamathanha #1] none of the claim area is included in that claim'. There is no other relevant information provided which would assist in resolving this particular question. Quite simply then, the application provides

that it may be there are land and waters which are commonly claimed between the two applications.

I note that prior to its recent amendment, Attachment H of the application conclusively stated that 'some or all' of those areas where s. 47B is said to apply, were claimed in the Adnyamathanha #1 application. Given the amendment to that attachment, it would seem the applicant no longer holds a conclusive view in this regard. Given the highly technical requirements of ss. 47A and 47B, as discussed below, this is perhaps not surprising.

Land and waters covered by the Adnyamathanha #1 application

In forming a view as to whether this application and Adnyamathanha #1 cover common land and waters it is necessary to identify the areas of land and waters covered by the latter application. I have obtained this information from the Register, which records details of the Adnyamathanha #1 application.

The Register indicates that the Adnyamathanha #1 application is the result of a combination of five native title applications variously made between 1994 and 1997. The area claimed by that application is described using a written description of the external boundary of the application area and a series of coordinates reflecting that boundary. However, not all areas within that boundary are covered or claimed by the application.

In particular, areas where previous exclusive possession acts were done are not covered by the Adnyamathanha #1 application, unless ss. 47, 47A or 47B apply to those areas.

Relevant case law regarding s. 47A and s. 47B

To the extent that each of the applications state that where s. 47A and/or s. 47B apply to a particular area then that area *is* claimed, consideration of the Adnyamathanha #1 application area does not advance this matter much further. In this instance, answering whether there is an overlap does not simply involve a consideration of whether two described areas refer to the same land and waters. It requires inquiry and consideration as to whether ss. 47A or 47B are applicable and, if so, to which of the applications they are applicable.

Questions regarding the applicability of ss. 47A and 47B are often complex and 'their applicability to any area will require findings of fact and law to be made as part of the hearing of [an] application': *Strickland v Native Title Registrar* [1999] FCA 1530 (*Strickland*) —at [55].[1]

While an applicant is not required to, and perhaps cannot, provide conclusive tenure information over an application area, they are required to describe the application area with reasonable certainty. In satisfying this requirement it is acceptable for an applicant to provide a class or formula description of areas which are, or are not, covered by an application. In considering whether such a description is sufficiently clear, it is appropriate to have regard to the state of knowledge an applicant could be expected to have, at the time the application is made or amended: *Daniel for the Ngaluma People and Monadee for the Injibandi People v the State of Western Australia* [1999] FCA 686 (*Daniel*) —at [32]; *Strickland* at [51] and [52].

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[1] *Strickland* was subject to an appeal to the Full Court of the Federal Court of Australia, however this finding was not considered or disturbed by the Full Court (see *Western Australia v Strickland* [2000] FCA 652).

In the instances I have referred to in *Daniel* and *Strickland*, the Court was concerned with whether an application area had been described sufficiently clearly. Consideration was not, at those instances, directed to matters regarding s. 190C(3).[2] Nonetheless, I do consider these comments are relevant as they demonstrate the highly technical and interpretive inquiries required by ss. 47A and 47B of the Act. Their applicability in any instance can only be resolved by the Court and only after a hearing of the application has occurred. Further, the Court has recognised an applicant will often not be able to give conclusive information regarding tenure. Nonetheless an applicant must provide as much information and detail as is available to them.

Consideration

Neither the applicant nor I can determinatively answer whether particular parcels of land in both Adnyamathanha #1 and the current application are claimable on the basis of s. 47A or s. 47B of the Act: see *Strickland* —at [55]. That information is necessary before it can be identified as a matter of certainty whether or not these applications cover common land or waters. Even if the applicant were to provide further tenure information, I still could not answer this determinatively. It is a question for the Court alone to resolve.

In these circumstances, it would be prohibitively difficult, if not impossible, for an applicant to satisfy me conclusively that there are no common land and waters between these two applications. Even if such information could be provided, it would not be within the scope of the registration test to reach a conclusive view on these questions. As French J (as his Honour then was) cautioned in *Strickland*, the requirements of the registration test are stringent and should not be elevated to the impossible —at [55].

Therefore, in this instance I consider it appropriate and reasonable to form a view in relation to s. 190C(3)(a) which is something less than certain. In this regard there are some general indications which offer support to the view that there is no overlap between this application and Adnyamathanha #1.

In order for s. 47A to be applicable to an area within an application, the conditions of that section must be satisfied at the date the application is made. I have explained that the Adnyamathanha #1 application was made before 5 February 2001, that being the date at which the applicant asserts s. 47A became applicable. Prior to this, it is said by the applicant that those areas were burdened by previous exclusive possession acts. Those are acts which are not covered or claimed by Adnyamathanha #1. Therefore, on the information available to me, it would seem there is no overlap between those specific areas.

In relation to the areas where s. 47B is asserted to apply, those areas are said to be entirely within the bounds of the s. 47A areas. While it is not impossible, it would seem unlikely that there was occupation of the s. 47B areas whilst they were entirely surrounded by previous exclusive possession acts in the form of perpetual leases. Further, I have no tenure information with which to give any consideration to the likely applicability of s. 47B(1)(b) (assuming such inquiry is appropriate at all).

While I have no tenure information about that area, the determination in *Adnyamathanha (No 2)* did detail areas which were not included in the determination area (but were covered by the

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[2] I note that *Strickland* did also consider s. 190C(3), however those comments and considerations are not directly relevant to this particular issue.

underlying application). Some of those areas, which are individually identified in the determination, were not determined because further inquiry was required to consider the applicability of s. 47B of the Act. None of those areas are covered by the current application: see *Adnyamathanha (No 2)* —at [4] and Attachment B1 of the application. In my view this lends some support to the understanding that the areas covered by the current application are not covered by the Adnyamathanha #1 application. If they were, presumably those areas would have been captured in these specified areas.

Finally, the area covered by the current application is quite small and confined to areas which appear to be described and defined with a high level of specificity. It would seem unlikely that the Adnyamathanha people would cause an overlapping application to be made over their currently registered application. It would seem further unlikely that such an application would be confined to such a comparatively small area of land and waters. Accordingly, on the face of it, it appears that the intention, and result, of this application is to claim land and waters which are not covered by the Adnyamathanha #1 application. I acknowledge these matters are inferential and not in any way conclusive of the issue.

For the reasons provided above I consider it appropriate to proceed on the basis that there is no overlap between the Adnyamathanha #1 application and the current application.

As I am not satisfied that this application is overlapped by any other application for a determination of native title, the conditions of s. 190C(3)(a) to (c) are not met and I do not need to consider the requirements of s. 190C(3) further.

Subsection 190C(4) Authorisation/certification

Under s. 190C(4) the Registrar/delegate must be satisfied that either:

(a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or

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

Note: The word ***authorise*** is defined in section 251B.

Section 251B provides that for the purposes of this Act, all the persons in a native title claim group authorise a person or persons to make a native title determination application . . . and to deal with matters arising in relation to it, if:

a) where there is a process of decision–making that, under the traditional laws and customs of the persons in the native title claim group, must be complied with in relation to authorising things of that kind—the persons in the native title claim group . . . authorise the person or persons to make the application and to deal with the matters in accordance with that process; or

b) where there is no such process—the persons in the native title claim group . . . authorise the other person or persons to make the application and to deal with the matters in accordance with a process of decision–making agreed to and adopted, by the persons in

> the native title claim group . . . in relation to authorising the making of the application and dealing with the matters, or in relation to doing things of that kind.

Under s. 190C(5), if the application has not been certified as mentioned in s. 190C 4(a), the Registrar cannot be satisfied that the condition in s. 190C(4) has been satisfied unless the application:

(a) includes a statement to the effect that the requirement in s. 190C(4)(b) above has been met, and
(b) briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) above has been met.

I must be satisfied that the requirements set out in either ss. 190C(4)(a) or (b) are met, in order for the condition of s. 190C(4) to be satisfied. For the reasons set out below, I am satisfied that the requirements set out in s. 190C(4)(b) are met.

As no certificate from an Aboriginal/Torres Strait Islander representative body has been provided with the application, I have considered whether the requirement of s. 190C(4)(b) is satisfied.

The nature of the Registrar's task at s. 190C(4)(b) was considered in *Doepel*, where it was found:

> In the case of subs (4)(b), the Registrar is required to be satisfied of the fact of authorisation by all members of the native title claim group. Section 190C(5) then imposes further specific requirements before the Registrar can attain the necessary satisfaction for the purposes of s 190C(4)(b). The interactions of s 190C(4)(b) and s 190C(5) may inform how the Registrar is to be satisfied of the condition imposed by s 190C(4)(b), but clearly it involves some inquiry through the material available to the Registrar to see if the necessary authorisation has been given —at [78].

For the purposes of s. 190C(5), I am satisfied that the information and statements required by that section are provided in the application. Schedule R of the application contains a statement that 'the applicants are members of the native title claim group and are authorised to make this application and to deal with matters arising in relation to it by the native title claim group'. That schedule also contains a statement which briefly sets out the grounds on which the Registrar should consider that the requirement in s. 190C(4)(b) has been met. The content of that statement is set out in my reasons below.

Is the applicant a member of the native title claim group?

As I have noted above, Schedule R of the application contains a statement that the applicants are members of the native title claim group. Having regard to this, I am satisfied that the persons comprising the native title claim group are members of the native title claim group.

Is the applicant authorised by all members of the native title claim group to make this application and deal with matters arising in relation to it?

The word 'authorise' is defined in s. 251B of the Act. Broadly, s. 251B provides that decisions to authorise the making of a native title determination application must be made in accordance with one of two decision making processes. I must be satisfied that one of these decision making process was relied on by the native title claim group in making decisions surrounding authorisation of the application: *Evans v Native Title Registrar* [2004] FCA 1070 —at [53]. In this regard, Schedule R of the application states that in the absence of a traditionally mandated

decision making process, the claim group made decisions about authorisation of the application via an agreed and adopted decision-making process.

While s. 190C(4)(b) refers to authorisation by 'all the other persons in the native title claim group', it is not necessary, in instances where s. 251B(b) is relied on, for each individual member to have been involved in making the decision to authorise the making of the application. Where that agreed and adopted decision making process otherwise permits, authorisation decisions which were made once the members of the claim group were given every reasonable opportunity to participate in the decision-making process may be sufficient to satisfy the requirement of authorisation: *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* [2002] FCA 1517 (*Lawson*) —at [25] and [28].

In *Lawson* the Court (Stone J) considered whether a decision to replace an applicant had been authorised by members of the native title claim group in accordance with s. 251B(b). In that instance, decisions had been made via an agreed and adopted decision making process, which involved a meeting attended by members of the claim group and voting on resolutions put to the meeting. In finding the proposed applicant had been authorised by the claim group, Stone J had regard to the following:

- all reasonable steps had been take to advise members of the claim group of the proposed meeting, where authorisation decisions were to be made —at [22];
- the meeting had been well attended by members of the native title claim group —at [27]; and concluded

that it is sufficient if a decision is made once the members of the claim group are given every reasonable opportunity to participate in the decision-making process —at [25].

Information provided

Schedule R of the application states:

> There is, within the claim group, no decision making process under the traditional laws and customs of the group relevant to authorising a native title claim.
>
> Instead, the claim group has agreed to and adopted a process of decision making within a corporate structure. Within this structure decisions as to authorisation of claims are made by the Adnyamathanha Traditional Lands Association (Aboriginal Corporation) RNTBC ("ATLA") in general meetings.
>
> The native title claim group through ATLA, in general meeting, first authorised the making of this claim, by the applicants, in April 2008. Most recently, the claim was explicitly authorised by the native title claim group at a special general meeting of ATLA on 13 March 2010. The motion which was moved and passed was:
>
> > "That ATLA agree to lodge the claim over Yappala including the small areas of Crown Land within the Yappala boundaries, with Alwyn McKenzie and Russell Coulthard as the named applicants."

Further information is also provided in the affidavit of Alwyn Hamilton McKenzie and Russell Coulthard, sworn on 26 August 2010. That information explains that the Adnyamathanha Traditional Lands Association (Aboriginal Corporation) RNTBC ('ATLA') was incorporated by Adnyamathanha people 'to make decisions in relation to their existing native title claims and any

future native title claims they wished to make' and that the constitution of ATLA provides for a 'process of decision-making by majority' in relation to those matters —at [3].

The affidavit explains that at a general meeting of ATLA in April 2008, it was resolved to make a native title application over 'all of the Yappala land held by Viliwarinha Yura Aboriginal Corporation' ('VYAC'). At that same meeting, Mr McKenzie was authorised, along with an Adnyamathanha person chosen by VYAC, to be named as the applicant for that application. On 24 July 2009, a special general meeting of VYAC 'having approved ATLA's nomination of Alwyn McKenzie, the members of VYAC resolved to approve the nomination of Russell Coulthard as the second named applicant' —at [4] and [5]. Subsequently a special general meeting of ATLA was held on 13 March 2010 where it was resolved by 'an overwhelming majority' that Mr Coulthard and Mr McKenzie were authorised to file the application over the Yappala land (and areas within those boundaries) on behalf of Adnyamathanha people —at [6].

Mr Coulthard and Mr McKenzie depose that notice to all ATLA members and Adnyamathanha native title holders was given in accordance with particular requirements of the ATLA rule book, including by placing an advertisement in an identified publication on 17 February 2010. Both the deponents were in attendance at the ATLA meeting held in March 2010, which was held over two days. It is deposed that on the first day there were over 110 Adnyamathanha adults in attendance and over 120 on the second day (13 March 2010). In this regard the deponents state that the attendees were 'properly representative of the claim group' —at [9].

Finally, it is deposed that the native title claim group description in Schedule A comprises the same living persons who were determined to hold native title in SAD 6001/98 and SAD 6002/98, Adnyamathanha #1 and #2 respectively. Other than those members who are under 18, all of those persons are 'members of ATLA (or eligible for membership)'.

Consideration

As the agreed and adopted decision making process in this instance involved resolution by the majority of attendees at a meeting of the native title claim group, it is my view that there is a close similarity between that process and that which was considered by Stone J in *Lawson.* Accordingly, I consider it appropriate to have regard to the matters identified by her Honour, which I have discussed above, when considering the requirements of s. 190C(4)(b) in this instance.[3]

I note that reference is made in the information to three meetings where decisions were made about the composition of the applicant and the making of the application. In my view the relevant meeting where authorisation was given was the one held in March 2010. It was at that meeting that ATLA/the native title claim group decided to authorise Mr McKenzie and Mr Coulthard as the persons who could make the application and deal with matters arising in relation to it. I do not suggest that the earlier meetings are not relevant to my consideration, but simply explain why the primary focus of my reasons is upon that later meeting.

Steps taken to advise members of the claim group of the proposed meeting where authorisation decisions were to be made

[3] I am aware that Stone J in *Lawson* was concerned with a motion to replace an applicant pursuant to s. 66B of the Act, however it is my view that her Honour's findings and observations are applicable to considerations of s. 190C(4)(b).

It is not entirely apparent from the information above what steps were taken to inform the native title claim group of the proposed meeting where authorisation decisions were made. Reference is made to compliance with certain rules of ATLA, including by publicly notifying the meeting in an identified newspaper. No further detail about that rule is provided. It is clear however that this process is said to have been agreed to by the native title claim group when incorporating ATLA and presumably when settling the rule book for that organisation. As the affidavit states, the making of and dealing with native title applications is one of the very purposes that ATLA was intended to be a vehicle for —at [3]. This decision making process (including notification efforts) is one which would seem to be familiar to the claim group and which has been used for an extended period.

Notwithstanding the possibly limited nature of this information, it appears that members of the native title claim group were informed and were aware of the March 2010 meeting. In particular, there were over 100 people in attendance at that meeting. In my view that is a significant number of people and suggests that members of ATLA/native title claim group were aware of the meeting. In addition to this, there is information that notice of the meeting was published in the Transcontinental newspaper which is said to circulate in Adnyamathanha country.

Having regard to these matters, I consider it is reasonably open to me to reach a view that all reasonable steps were taken to advise members of the proposed authorisation meeting, notwithstanding I do not have information about all of those steps.

Was the meeting well attended?

As I have indicated above, there were over 100 people in attendance at this meeting and I consider that this is a relatively large number of people attending a meeting.

Further, the deponents state that the attendees were properly representative of the claim group. As the deponents are themselves members of the claim group, it is reasonable to consider that they would have knowledge about the members of that group and that they would also be aware of who was required to participate in that decision making process.

Having regard to these matters I am satisfied that the meeting was well attended by members of the native title claim group.

Were members of the claim group otherwise given a reasonable opportunity to participate in the decision making process?

The information discloses that persons making decisions about authorisation were persons who were both members of the native title claim group and members of ATLA. I understand it was their membership to ATLA which entitled them to vote at the authorisation meeting. I further understand that all members of ATLA are members of the native title claim group. While it would seem that a large proportion of the claim group are members of ATLA, it is not apparent that all members of the native title claim group are members of ATLA (although they are be entitled to become members) —see the affidavit at [11].

Nonetheless, the information within the affidavit satisfies me that the members of the claim group did have a reasonable opportunity to participate in the decision-making process. It is stated that notice of the meeting was provided to members of ATLA and Adnyamathanha native title holders and that all adult Adnyamathanha people are members of that organisation or are otherwise entitled to become a member: second affidavit —at [8] and [11].

Further, as I have explained above, ATLA has been incorporated for a number of years and is the registered native title body corporate for Adnyamathanha people in two previous determinations of native title. It is not a corporation which was established a short time ago and which members of the native title claim group could not reasonably be expected to be aware of. Further, the high level of attendance at the authorisation meeting would again suggest that the members of the claim group had a reasonable opportunity to participate in the decision making process. Having regard to this information, I am satisfied that members of the claim group were given a reasonable opportunity to participate in the decision making process.

The information indicates that this particular application was discussed over a number of years and was ultimately authorised by a sufficiently representative contingent of the native title claim group, via an agreed and adopted decision making process.

I am therefore satisfied that the applicant is authorised to make this application and deal with matters arising in relation to it on behalf of the native title claim group.

Merit conditions: s. 190B

Subsection 190B(2)

Identification of area subject to native title

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

The application satisfies the condition of s. 190B(2).

Areas of land and waters covered by the application

Attachment B1 of the describes the area of land and waters covered by the application as all land and waters within a detailed list of lots, which are identified by reference to section, hundred and county. Volume and folio details are also provided and, where applicable, lease numbers have also been provided.

Attachment C of the application contains an A4 black and white map which depicts the area of land and waters covered by the application. The map, which was prepared by the Tribunal's Geospatial Services on 16 June 2010, contains the following features:

- the application area depicted by a solid dark outline and stippled infill;
- tenure information;
- lots subject to the application which are labelled referencing section and hundreds;
- scalebar, northpoint, coordinate grid, legend and location diagram;
- notes relating to the source, currency and datum of data used to prepare the map.

Area of land and waters within the external boundary which are not covered by the application

Attachment B2 identifies, by reference to terms defined in the Act (such as Category A past acts and Category A intermediate period acts, et cetera), a number of acts which may occur over land or waters. Where any land or waters within the external boundary of the application are affected by the nominated acts, those land and waters are not covered by the application.

I note that the map provided at Attachment C also appears to exclude from the application area various tracts of land which are surrounded by the application area. These areas have not been specifically identified in Attachment B2 because, I understand, the external boundary of the application area has been drawn so as to exclude them.

Consideration

Within my reasons regarding s. 190C(3), I have extracted comments made by the Court in *Daniel* and *Strickland*. Those extracts, and my associated discussion, explain that an applicant is not required to identify each parcel of land within the bounds of the application that are not covered; it is sufficient for the applicant to provide a class or formula description of those areas where that is the level of specificity which an applicant could be expected to provide. For the reasons I have provided at s. 190C(3), I am satisfied that such an approach in this instance is consistent with the information currently available to the applicant.

In considering this requirement I have had regard to a geospatial assessment and overlap analysis prepared by the Tribunal's Geospatial Services on 10 December 2010 ('geospatial report'). The geospatial report contains the opinion that the map and written description provided at Attachment B1 are consistent and do describe the application area with reasonable certainty. I have myself considered the map and written description and have reached the view, consistently with the geospatial report, that the information provided at Attachment B, Attachment B1 and Attachment C is sufficient to describe the area with reasonable certainty.

For these reasons I am satisfied the requirements of s. 190B(2) have been met.

Subsection 190B(3)
Identification of the native title claim group

> The Registrar must be satisfied that:
> (a) the persons in the native title claim group are named in the application, or
> (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

The application **satisfies** the condition of s. 190B(3).

Schedule A of the application contains the following description of the members who comprise the native title claim group:

> The native title claim group comprises those living Aboriginal people who:
>
> 1) Are the descendants (whether biologically or by adoption) of the apical ancestors in Attachment A [which names or describes at least 12 apical ancestors];
> 2) Identify as Adnyamathanha; and
> 3) Are recognised by other Adnyamathanha native title claimants under the traditional laws and customs as having maintained an affiliation with, and continuing to hold native title rights and interests in, the claim area.
>
> See paragraph 11 of Affidavit of Russell Coulthard and Alwyn Hamilton McKenzie dated 26 August 2010.

As the application does not name each member of the native title claim group, I must consider whether the requirements of s. 190B(3)(b) are satisfied.

In considering whether a claim group description is sufficiently clear for the purposes of s. 190B(3)(b), I do not consider the correctness of the claim group description or whether 'there is a cogent explanation of the basis upon which [the members] qualify for such identification': *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala #2* [2007]) at [33]; *Doepel* —at [47].

Rather, I only consider whether the claim group description is sufficiently clear to allow for it be ascertained whether any particular person is in that group, even if some factual inquiry would be required before that question could be answered in a given instance: *Western Australia v Native Title Registrar and Ors* [1999] 95 FCR 93 (*WA v NTR*) —at [67].

I am also aware that it is appropriate, where applicable, to read the paragraphs of a claim group description as part of a discrete paragraph rather than separate unrelated conditions or requirements: *Gudjala #2* [2007] —at [34].

The native title claim group description states that persons meeting the three criteria set out at Schedule A of the application will be members of the native title claim group. As an initial criterion, a person must be a descendant from one or more named apical ancestors. In my view it is well settled that such a criteria or condition of membership is sufficiently clear for the purposes of s. 190B(3)(b): see for example *WA v NTR* —at [67].

It is then necessary to consider whether that person identifies as a member of the native title claim group. I am satisfied that, reading the description as a whole, this requirement of self-identification is not problematic. A person must be a descendant of certain named persons. Where they are, and they identify as an Adnyamathanha person, they satisfy this criterion.

Finally, it is then necessary to consider whether that individual is recognised by other Adnyamathanha claimants as having maintained an affiliation with the claim area, and as continuing to hold native title rights and interests in that area. The claim group description provides an explanation of the relevant matters which will be considered by members of the claim group when deciding whether they recognise an individual as an Adnyamathanha person. Those criteria are confined to matters of the individual's affiliation with the claim area and their possession of native title rights and interests, as mediated under Adnyamathanha traditional law and custom. In my view, this matter is answerable with further factual inquiry. In some instances that inquiry will likely be difficult. However, difficulty in inquiry does not lead to a conclusion that the description is not sufficiently clear: *WA v NTR* —at [67].

When read as a whole, the native title claim group description is sufficiently clear to enable it to be ascertained whether any particular person is a member of the native title claim group. Accordingly, I am satisfied the requirement of s. 190C(3)(b) has been met.

Subsection 190B(4)
Native title rights and interests identifiable

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

The application **satisfies** the condition of s. 190B(4).

In considering whether the requirements of s. 190B(4) are satisfied, I must consider whether the native title rights and interests claimed by the application are understandable and have meaning: *Doepel* —at [99]. I am not required to consider whether any particular right or interest is established or otherwise supported by the application. That being, generally, the task required by s. 190B(6).

Attachment E of the application describes the native title rights and interests claimed by the application in the following way:

> **Definitions**

In this application:

(a) all words used in this application which are defined in the *Native Title Act 1993* (Cth) ("NTA") bear the same meaning as in that Act, unless the context dictates otherwise;

(b) "Claim Area" means the area covered by this application as described in Schedule B;

(c) "resources" does not include:

   (i) minerals (as defined in the *Mining Act 1971* (SA)); and

   (ii) petroleum (as defined in the *Petroleum and Geothermal Energy Act 2000* (SA)).

Rights

The native title rights and interests claimed comprise:

1) Subject to paragraph 2, the nature and extent of the native title rights and interests held by all Native Title Holders in relation to the Claim Area are rights to use, stay on and enjoy the land and waters of the Claim Area being:

   a) the right to possess, occupy, use and enjoy the claim area as against the whole world [a footnote is included in the application at this point which states: 'In relation to the land and waters to which sections 47A or 47B apply'];
   b) The right to access and move about the Claim area;
   c) The right to live, to camp and to erect shelters on the Claim area;
   d) The right to hunt and fish on the Claim area;
   e) The right to gather and use the nature resources of the Claim area such as food, plants, timber, resin, ochre and soil;
   f) The right to cool and to light fires for cooking and camping purposes on the Claim area;
   g) The right to use the natural water resources of the Claim area;
   h) The right to distribute, trade or exchange the natural resources of the Claim area;
   i) The right to conduct ceremonies and hold meetings on the Claim area;
   j) The right to engage and participate in cultural activities on the Claim area including those relating to births and deaths;
   k) The right to carry out and maintain burials of deceased native title holders and of their ancestors within the Claim area;
   l) The right to teach on the Claim area the physical and spiritual attributes of locations and sites within the Claim area;
   m) The right to visit, maintain and preserve sites and places of cultural or spiritual significance to Native Title holders within the Claim area;
   n) The right to speak for and make decisions in relation to the Claim area about the use and enjoyment of the Claim area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the Native Title Holders;
   o) The right to be accompanied on to the Claim 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 Claim area; or
      iii) people who have rights in relation to the Claim area according to the traditional laws and customs acknowledged by the Native Title Holders; or
      iv) people invited by Native Title Holders to assist in, observe, or record traditional activities on the Claim area.

2) The native title rights and interests claimed are for personal, domestic and non-commercial communal use.

3) The native title rights and interests are subject to and exercisable in accordance with:

   a) the traditional laws and customs of the native title claim group;
   b) the valid laws of the State and Commonwealth, including the common law.

I am satisfied that the description of the native title rights and interests claimed by the application is sufficient to allow those rights and interests to be readily identified. That is, they are understandable and otherwise have meaning.

Subsection 190B(5)
Factual basis for claimed native title

> The Registrar must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
> (a) that the native title claim group have, and the predecessors of those persons had, an association with the area, and
> (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interest, and
> (c) that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The application satisfies the condition of s. 190B(5) because the factual basis provided is sufficient to support each of the particularised assertions in s. 190B(5), as set out in my reasons below.

In *Doepel*, Mansfield J found:

> Section 190B(5) is carefully expressed. It requires the Registrar to consider whether the "factual basis on which it is asserted" that the claimed native title rights and interests exist "is sufficient to support the assertion". That requires the Registrar to address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests. In other words, the Registrar is required to determine whether the asserted facts can support the claimed conclusions. The role is not to test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts —at [17]; affirmed in *Gudjala #2 FC* —at [54] and [83].

Section 190B(5) was also considered in *Gudjala #2 FC* where the Full Court found:

> [I]t is only necessary for an applicant to give a general description of the factual basis of the claim and to provide evidence in the affidavit that the applicant believes the statements in that general description are true. Of course the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar . . . and be something more than assertions at a high level of generality. . . [t]he applicant is not required to provide evidence that proves directly or by inference the facts necessary to establish the claim' —at [92].

The applicant has provided the following information directly to the Registrar for consideration in the application of the registration test:

- affidavit of Alwyn Hamilton McKenzie and Russell Coulthard sworn 26 August 2010;
- *Adnyamathanha No 1 Native Title Claim Group v the State of South Australia* [2010] FCA 358;
- *Adnyamathanha No 1 Native Title Claim Group v the State of South Australia* (*No 2*) [2010] FCA 359 (*Adnyamathanha (No 2)*);
- Ellis, B., *Adnyamathanha Native Title Report*, volumes 1 to 3, January 2007;
- statement of [claim group member 1], preservation of evidence hearing (SAD 6001/98), dated 11 October 2007;
- supplementary statement of [claim group member1] concerning sites, preservation of evidence hearing (SAD 6001/98), dated 11 October 2007;
- extract of the transcript of evidence from the examination-in-chief and cross examination of [claim group member1] on 31 October 2007 in proceeding SAD 6001/98 (at pages 278 to 286 (inclusive));
- aide memoir prepared by Bob Sheppard in relation to the evidence of [claim group member 1] referred to immediately above (at pages 31 and 32); and
- document entitled 'Submission – summary of evidence' filed in relation to SAD 6001/98 Adnyamathanha #1, SAD 6002/98 Adnyamathanha #2 and SAD 6011/98 Barngarla native title determination applications;

When considering the requirements of s. 190B(5), I have considered the above information it in its entirety; however due to its length I have not provided a detailed summary of it in these reasons.

I have considered each of the three assertions set out in the three paragraphs of s. 190B(5) in turn before reaching this decision.

Reasons for s. 190B(5)(a)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

Section 190B(5)(a) requires a factual basis which is sufficient to support the assertion that the native title claim group have, and its predecessors had, an association with the application area.

The term 'association' is not defined in the Act. The nature of a claim group's association with an application area may be physical, spiritual or something else. Section 190B(5)(a) does not require a claim group's association with the relevant area to possess specific characteristics or features. It is a matter for the applicant to explain the nature of their association and provide a factual basis sufficient to support that assertion: *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) —at [26].

Whatever the nature of the association, a factual basis must be sufficient to support the assertion that the whole native title claim group has an association with the land and waters claimed. It must also be sufficient to support the assertion that the predecessors of the native title claim group had an association with the area at the time sovereignty was acquired: *Gudjala #2* [2007]—at [52].

Information provided about the association of the predecessors of the native title claim group with the application area

The current application area is entirely surrounded by the Adnyamathanha #1 application and a determination made on 30 March 2010 recognising Adnyamathanha people as native title

holders.[4] The applicant has provided the Registrar with a copy of *Adnyamathanha (No 2)*, which is the consent determination that recognises Adnyamathanha people as the native title holders of a portion of land and waters covered by the application SAD 6001/98 Adnyamathanha #1 and all areas covered by SAD 6002/98 Adnyamathanha #2. In that instance, the Court (Mansfield J) observed:

> The evidence also addresses the relationship between the claim group's society and the society in the determination area at sovereignty. The earliest recorded ancestors for the contemporary Adnyamathanha society are traced back to the mid-19th century. The evidence shows that those ancestors were living and observing traditional laws and customs in the relevant areas at that time. It is easy to infer that ancestors of those persons occupied the proposed determination area at sovereignty, and that the current claim group is directly linked to them: *Adnyamathanha (No 2)*—at [27].

The Ellis report explains that Adnyamathanha country is describable as the Flinders Ranges and surrounding areas and that the Adnyamathanha #1 and Adnyamathanha #2 applications are generally coincident with those areas: Ellis report —at volume 1 [1] and [59].[5]

Information provided within the Ellis report explains that at the time when South Australia was settled, Adnyamathanha country was occupied by a number of dialectal groups, which after sovereignty became consolidated into one contemporary Adnyamathanha society: Ellis report —at volume 1 [54]. Prior to settlement, the term Adnyamathanha was not particularly used by the predecessors of the native title claim group as a self-descriptor. However, it was used by neighbouring groups as a broad reference to the people who occupied the Flinders Ranges and its surrounds. That term roughly translates to rock/stone people but is better understood as 'ranges people' or 'hills people': Ellis report —at volume 1 [58] and [59].

Prior to non-Indigenous settlement of the area, the dialectical groups who were the predecessors of the contemporary Adnyamathanha society resided within the Flinders Ranges. Specific information is provided about some of the ancestors who are named at Schedule A of the application. Having given that information, Mr Ellis opines that 'the known antecedents of the Adnyamathanha claimants were directly descended from those in occupation of the claim area at sovereignty' —at [488].

Non-Indigenous settlement of Adnyamathanha country resulted in the creation of a large number of pastoral interests, with which Adnyamathanha people had, and continue to have, a close association: Ellis report —at volume 1 [5] to [6] and [34] to [39]. Despite this high level of settlement activity, Adnyamathanha people were able to continue residing within their country, through means such as working on pastoral stations, offering services required by the pastoral industry and in other instances, by establishing their own settlements in areas of significance to them: Ellis report —at volume 1 [34] to [42].

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[4] On that occasion the Court made two determinations in relation to that application (and another regarding the Adnyamathanha #2 application. The determination I am referring to is the larger of the two, which is also known as Stage 1.

[5] The report was prepared in relation to these applications. The determination made within Adnyamathanha #1 and #2 occurred after this report was prepared. When I refer to the Adnyamathanha #1 application as discussed within the Ellis report, I am also referring to the determination area (unless specifically stated otherwise).

Information is also provided in the Ellis report about the current application area (or otherwise areas highly proximate to it) rather than the broader Adnyamathanha #1 application area. In particular, reference is made to the Yappala property which 'operates as a homestead for members of the Adnyamathanha community' and where 'it is likely that a s. 47 or s. 47A claim will be made over the perpetual leases in the Yappala area held by Viliwaranha Yuras': Ellis report —at volume 1 [6] and [8]. I discuss the location of this area in my consideration below.

The applicant has also provided an extract of court transcripts taken on 31 October 2007 which recorded the preservation evidence of [claim group member1]. The provided extract is evidence given by [claim group member 1] while on the Yappala property and in part refers to a site on that property where there are paintings which were made a long time ago, before white people came. Information is also provided about other sites within that general area where stories and songs are known by Adnyamathanha people. [Claim group member 1] explains that, as an elder, he is required to look after some of these areas. Permission is required from Adnyamathanha people before other persons can access those areas.

Association of the native title claim group with the application area

As averred above, information is provided within the Ellis report which explains the ongoing association of Adnyamathanha people with their country, despite the presence of pastoral and other interests within those areas. As to the contemporary association of the native title claim group with their country the Ellis report states:

> [16] About 300 claimants continue to live within the claim area. A majority of these were also born within the claim area. That figure represents approximately 14% of the total number of Adnyamathanha Native Title claimants who numbered 2,200 at the time of this report's preparations. Those claimants who live within the claim area are mostly resident in the townships of Nepabunna, Copley, Leigh Creek, Beltana and Hawker and on properties owned or operated by the Adnyamathanha claimants. Significant Adnyamathanha populations, many of the members of which were born within the claim area, live outside the claim area in the nearby cities of Port Augusta and Whyalla where medical, social and government services are more accessible. As this report discusses later, claimants have sought to maintain connection with the claim area through personal visits and through their participation in community events.
>
> [17] While the Adnyamathanha population is now more widely dispersed that it was twenty years ago, members still maintain close social contact and events such as funerals attract participants from throughout the region and from Adelaide. The group continues to function as one single social unit regardless of the fact that many today live away from the claim areas [footnotes omitted].

In his witness statement, [claim group member1] also states that Adnyamathanha country is in and around the Flinders Ranges and that since settlement of that area, Adnyamathanha people have worked and resided on pastoral stations within their country —at [3]. [Claim group member 1] also names each of his siblings and explains that most of them were born on Adnyamathanha country —at [8]. Four of those siblings, born between 1945 and 1959, were born at Hawker —at [9]. Hawker is within the Adnyamathanha #1 application area and is closely located to the south-east of the current application area.

In his supplementary witness statement, [claim group member 1] provides information about a number of sites which are significant to Adnyamathanha people. These sites appear to be located

around the application area with varying degrees of proximity. One of these sites is described as Yurapila or Yourambulla Caves. This area has a mura[6] story associated with it, which describes activities and events happening to Adnyamathanha ancestors. Based on the description given by [claim group member 1], I understand that area is generally located to the south east of the application area —at [16] to [19].

There is other information provided within the material I have before me which addresses the native title claim group's association with Adnyamathanha country. However, in my view, the summary I have provided above is sufficient to show the breadth of information the applicant has provided. That is, the above summary is demonstrative but not exhaustive of the information provided by the applicant.

Consideration

The native title holders recognised in the *Adnyamathanha (No 2)* determination are, with two exceptions, identical to the native title claim group on whose behalf the current application has been made: *Adnyamathanha (No 2)* —at Annexure [6]; Schedule A of the application.[7] Further, at certain points the application area abuts the determination area. Having regard to these similarities, I am satisfied that the comments and observations made within the determination do support the assertion that the Adnyamathanha people have an association with the application area, notwithstanding the determination did not apply to, or consider, the application area.

As well as the determination, the applicant has also provided information about the predecessors' association with the application area specifically. This is primarily found within the on-country evidence of [claim group member 1] given at Yappala. Having regard to Attachment B1 and Attachment C of the application and maps held by the Tribunal which depict the Adnyamathanha #1 application and determination areas, I understand that property is within or otherwise highly proximate to the application area.

That same property is also referred to within the Ellis report as being an area where Adnyamathanha people reside. In addition to that specific area information, the Ellis report provides information about Adnyamathanha people's ongoing association with their country more generally. While that association has changed over time as a result of non-Indigenous settlement, Adnyamathanha people variously live on or visit their country. Activities undertaken while on country include associating with other Adnyamathanha people and attending various cultural events such as funerals.

Having regard to this information, I am satisfied the factual basis is sufficient to support the assertion that the native title claim group have, and its predecessors had, an association with the application area.

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[6] This term is referred to in a number of the sources which were provided by the applicant. While not a comprehensive description, I understand it broadly refers to Law or dreaming and is also referred to as Muda.

[7] Those exceptions refer to the ancestors who are described in the application as 'the siblings of [six named individuals]' and 'the siblings of Angepena Billy or Mary'. The determination refers to those same two groups of traditional ancestors but omits the word 'of'. That is, the determination records 'the siblings [and then names the six individuals]' and 'the siblings Angepena Billy or Mary'. Notwithstanding this, I consider it reasonable to understand that these two descriptions are said to be the same or otherwise that they describe the same people.

Reasons for s. 190B(5)(b)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(b).

The term 'traditional' was considered by the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria and Ors* (2002) 214 CLR 422; [2002] HCA 58. In that instance the majority found that a law or custom would be 'traditional' where:

- the origin or the content of the law or custom concerned is found in the normative rules of the relevant society which existed before the assertion of sovereignty by the Crown—at [46];
- the law or custom has been passed from generation to generation of a society, usually by word of mouth or common practice —at [46];
- the normative system which existed before sovereignty has had a continuous existence and vitality since sovereignty —at [47]; and
- the acknowledgement and observance of the law or custom has continued substantially uninterrupted since sovereignty —at [87].

It is appropriate that I have regard to this understanding of the meaning of 'traditional' when considering whether there is a factual basis which is sufficient to support the assertion that there are traditional laws acknowledged and traditional customs observed by the native title claim group, which is the task required by s. 190B(5)(b): see *Gudjala #2* [2007]—at [25], [62], [63] and [82]; *Gudjala #2* [2009]—at [22][8].

Further, as the wording of s. 190B(5)(b) suggests, I must be satisfied that the factual basis is sufficient to support the assertion as it relates to the native title claim group as a whole. In this regard I note Dowsett J's observation or finding that 'it was necessary that the alleged facts support the claim that the identified claim group (and not some other group) held the identified rights and interests (and not some other rights and interests)': *Gudjala #2* [2007] –at [39].

Finally, a factual basis must also be sufficient to support the assertion that there was a society in the application area which acknowledged and observed laws and customs and with which a contemporary native title claim group has some link or connection: *Gudjala #2* [2007] —at [66], [68] and [70].

Information provided in Adnyamathanha (No 2) and the Ellis Report

As the High Court identified in *Yorta Yorta*, a law or custom will be traditional where the normative system which existed before sovereignty has had a continuous existence and vitality since sovereignty —at [47]. In considering this aspect of 'traditional' for the purposes of the registration test, Dowsett J observed that a sufficient factual basis will, in part, require information which supports the assertion that laws and customs have been passed down continuously through a society which existed prior to sovereignty and continues to exist: *Gudjala #2* [2009]—at [22]. Accordingly, the factual basis must be sufficient to support the assertion that such a society existed at or prior to sovereignty.

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[8] The Full Court in *Gudjala #2* [2008] did not criticise his Honour Dowsett J's understanding or construction of this requirement. In my view the reasoning expounded by his Honour in *Gudjala #2* [2009] does not meaningfully differ from that original decision.

In *Adnyamathanha (No 2)*, Mansfield J outlined the evidence and submissions which were before his Honour —at [19] to [24]. It is apparent from that description that the information I have before me was also some of the information before his Honour. This includes the Ellis report. Having considered all of the evidence, the Court made the following observations:

> [25] The relevant native title claim group, the Adnyamathanha people, and its society, is clearly identified . . . The term "Adnyamathanha" refers to a much larger group than that term originally described . . . The Ellis Report shows that the contemporary Adnyamathanha society is comprised of those traditionally closely related groups, and that the ethnographic records suggest those groups have a long history of inter-marriage, co-residence and joint ceremonial activities allowing them to be characterised as an appropriate traditional society for native title purposes (Ellis Report at [145]). 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 NT Act.
>
> [28] The evidence shows a substantially uninterrupted observance of traditional laws and customs since sovereignty, albeit not necessarily homogenous in the level of its observation, and notwithstanding varying levels of knowledge and enforcement amongst the Adnyamathanha people. One of the key features of the normative society is the division of the Adnyamathanha people into two matrilineal moieties, Matheri and Arraru. Its importance is recognised and observed by all the Adnyamathanha people interviewed, including younger claimants. . .
>
> [29] In addition, the continued use of the Adnyamathanha language amongst many of the Adnyamathanha people, including in social contexts where it is often the language of choice, and the encouragement to the younger generations to continue its vibrancy is a strong identifier of ongoing Adnyamathanha custom and identity. So too is the ongoing knowledge of muda (also mura) or Dreaming traditions. That was particular evident [sic] during the preservation evidence of [claim group member 1], as well as in other statements and interviews. . .
>
> [30] There are additionally, other laws and customs for which there is contemporary evidence including:
>
> - The traditional way to butcher and cook kangaroo;
> - Speaking with and respecting spirits in the land;
> - Age based hierarchy;
> - Physical maintaining and protecting sites of significance; and
> - Maintaining gender and status based restrictions in relation to Dreaming Law.
>
> [31] In my view, the material demonstrates the uninterrupted observance of many traditional laws and customs since sovereignty by the Adnyamathanha people, thereby defining their society, by actively promoting and protecting their cultural heritage for many years.

I have read the Ellis report and am of the view that Mansfield J's observations summarise the report as it relates to the considerations relevant for s. 190B(5)(b). As such, I do not provide a summary of that report for this particular requirement of s. 190B(5). For reasons explained below, I am also of the view that the information above is sufficient to support the assertion required by s. 190B(5)(b). However, as the applicant has provided a substantial amount of additional information, I provide some instances of those documents which also support this particular

assertion. As with my summary at s. 190B(5)(a), these examples are not exhaustive of the information provided.

Further information regarding Adnyamathanha society and membership to that society

[Claim group member 1's] supplementary witness statement also provides information about Adnyamathanha society and its members:

> [49] You can still see the camp at Blinman where they held the Wibmarla. My Dad showed me this place. They all met on the other side in the Mallee scrub. They said let us now be Adnyamathanha. Adnya means rock, mathanha means people. They all agreed.
>
> [50] Two men hit two rocks together when they made this decision. This signified that from now on they were all the stone people, ie Adnyamathanha. I'm not sure exactly when this was. It happened before I was born. My father told me this.[9]

The summary of witness statements provided by the applicant includes a summary of a statement provided by [claim group member 2]. That summary explains [claim group member 2] understanding that 'the most important factor to be identified as Adnyamathanha is that a person be descended from Adnyamathanha people'. One way in which people may demonstrate their involvement with Adnyamathanha society is by learning to speak Yura Ngawarla and to live on, or regularly visit, country and develop knowledge of country and stories associated with that country.

The summary of [claim group member 3's] statement also explains that:

> [Claim group member 3] refers to kinship/descent as being the most important identifier as to who and who is not Adnyamathanha.
>
> However, she says that Adnyamathanha may then consider factors such as living on country or visiting country regularly, caring for country, knowledge of moiety and relationships to other Adnyamathanha, talking and teaching Yura Ngawarla to their children, in assessing the extent to which some Adnyamathanha people maintain strong links with the Adnyamathanha community and country.

Further information regarding moieties

[Claim group member 1] explains in his witness statement the moieties come from the mura/Adnyamathanha Law and that he and his siblings are Arraru moiety —at [2]. In an overly simplified summary, I understand from the Ellis report that under Adnyamathanha law, marriage should be between members of opposing moieties: see for example volume 1 —at [215] and [399]. This is also addressed in [Claim group member 1's] statement.

When [claim group member 1's] parents married, his mother took on Arraru moiety because her husband ([claim group member 1's] father) was Mathari moiety. As [claim group member 1's] mother was Arraru moiety so are her children. In a similar vein, [claim group member 1's] children are Mathari moiety because his wife/their mother is Mathari —at [5] to [6], [14] and [17] to [18].

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[9] Information regarding this matter is also discussed in [claim group member 1's] witness statement —at [35] to [39].

Information is also provided in the summary of a number of witness statements made by Adnyamathanha people in Adnyamathanha #1. Some information contained within that document includes:

- [Claim group member 4's] witness statement includes information about the importance of the two moieties within Adnyamathanha society. Information is provided about [Claim group member 4's] moiety and the broader role that moieties have within contemporary Adnyamathanha society. [Claim group member 4's] knowledge of Adnyamathanha Muda or law stories was derived from his father, grandfathers and uncles as a young man. [Claim group member 4's] now takes younger Adnyamathanha people to areas within his country and teaches them the Muda and undertakes traditional activities such as hunting and gathering bush tucker.
- [Claim group member 5's] statement includes information about her grandfather who was '"headman of the Arraru moiety in relation to ceremonies" and who passed away in 1952. [Claim group member 5] is also of the Arraru moiety. [Claim group member 5's] was given knowledge about country from her parents and grandparents and she now regularly returns to her country with her children to show them Adnyamathanha sites and tell them stories about country.
- [Claim group member 2] is of the Arraru moiety and she explains in her statement that traditionally major decisions were made by consensus of senior people in different moieties. This balance of moieties is important when deciding important issues such as decisions about country.

Consideration

In considering information provided in *Adnyamathanha (No 2)*, I appreciate that Mansfield J's comments were made in relation to the determination area and not the areas covered by this application. Notwithstanding this, I am of the view that the observations made by Mansfield J do support the assertion that there are traditional laws acknowledged and traditional customs observed by the native title claim group which give rise to the claim to native title rights and interests. In particular, I have explained my understanding that:

- the Adnyamathanha people referred to in *Adnyamathanha (No 2)* are those people on whose behalf this application is made;
- there is a close proximity between the very large area subject to the determination and the comparatively small area covered by this application; and
- the evidence referred to by his Honour was in part referring to the Ellis report and [claim group member 1's] preservation evidence.

To the extent that the information in *Adnyamathanha (No 2)* does not refer to the application area specifically, I consider the information I have previously summarised addresses that matter. I have explained within my reasons at s. 190B(5)(a) that I am satisfied the Ellis report provides information which is sufficient to support the assertion that the native title claim group have, and its predecessors had, an association with the application area. Having regard to those reasons, I am satisfied that the factual basis is sufficient to support the assertion that there is a link between the native title claim group, its predecessors and the area covered by the application.

The decision of *Adnyamathanha #2*, the Ellis report and the balance of information provided by the applicant are sufficient to support the assertion that there are traditional laws acknowledged and traditional customs observed by the native title claim group which give rise to the claim to native title rights and interests.

Reasons for s. 190B(5)(c)

I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(c).

This subparagraph requires an applicant to provide a factual basis which is sufficient to support the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

The information summarised above in my reasons regarding ss. 190B(5)(a) and (b) supports the assertion that the native title claim group continue to hold native title in accordance with their traditional laws and customs.

Subsection 190B(6) Prima facie case

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

The application satisfies the condition of s. 190B(6). The application **satisfies** the condition of s. 190B(6). I am of the view that all of the claimed native title rights and interests can be established prima facie, for the reasons that now follow.

My task at s. 190B(6) is to consider whether at least some of the rights and interests claimed can be established prima facie. A claim should be accepted on a prima facie basis if 'on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law': *Doepel* — at [135].

I note that 'native title rights and interests' is defined at s.223(1) of the Act, as extracted in my consideration of s. 190B(4) above. In considering whether a particular right or interest is established prima facie, it is my view that I must be satisfied that the application establishes prima facie that:

1. The right or interest exists under traditional law and custom in relation to any of the land or waters under claim

A native title right or interest must be possessed under the traditional laws acknowledged and traditional customs observed by the claim group —s. 223(1)(a). As I have discussed in my reasons at s. 190B(5), *Yorta Yorta* offers authority on what is meant by 'traditional law and custom'. I rely on that summary here.

While I am not required to be satisfied that the claimed native title right or interest can be made out at trial, I must be satisfied that there is some evidentiary material which establishes prima

facie, that the claimed right or interest exists under traditional law or custom: see *Gudjala #2* [2007] —at [86]; *Doepel*—at [126].

2. The right or interest is in relation to land or waters

Section 223(1) requires a native title right or interest to be in relation to land or waters. In my view, where a claimed right or interest is not one which is prima facie in relation to land or waters, it could not be considered established prima facie as a native title right or interest.

In considering each of the claimed native title rights and interests, I am satisfied that they are established prima facie, each in relation to land or waters. Having regard to the particular rights and interests claimed, I consider that my reasons for holding this view are reasonably understandable and do not require further explanation.

3. The right or interest has not been extinguished over the whole of the application area

In my view the requirement that a native title right or interest be recognised by the common law of Australia (s. 223(1)(c)) requires me to have regard to settled law regarding extinguishment of native title rights and interests when considering whether a particular right or interest is established prima facie.

For example, if there is evidence that the application is or was entirely covered by a non-exclusive pastoral lease, I could not (unless ss. 47, 47A or 47B applies) consider exclusive rights or interests to be established prima facie, having regard to settled law regarding the extinguishing effect of non-exclusive pastoral leases on exclusive native title, including *Western Australia v Ward* (2002) 213 CLR 1; [2002] HCA 28 (*Ward*).

I now explain why I am satisfied that each of the claimed native title rights and interests are established prima facie.

Non-exclusive native title rights and interests

a) The right to access and move about the Claim area;
b) The right to live, to camp and to erect shelters on the Claim area;
c) The right to hunt and fish on the Claim area;
d) The right to gather and use the nature resources of the Claim area such as food, plants, timber, resin, ochre and soil;
e) The right to cook and to light fires for cooking and camping purposes on the Claim area;
f) The right to use the natural water resources of the Claim area;
g) The right to distribute, trade or exchange the natural resources of the Claim area;
h) The right to conduct ceremonies and hold meetings on the Claim area;
i) The right to engage and participate in cultural activities on the Claim area including those relating to births and deaths;
j) The right to carry out and maintain burials of deceased native title holders and of their ancestors within the Claim area;
k) The right to teach on the Claim area the physical and spiritual attributes of locations and sites within the Claim area;
l) The right to visit, maintain and preserve sites and places of cultural or spiritual significance to Native Title holders within the Claim area;
m) The right to speak for and make decisions in relation to the Claim area about the use and enjoyment of the Claim area by Aboriginal people who recognise

themselves to be governed by the traditional laws and customs acknowledged by the Native Title Holders;

n) The right to be accompanied on to the Claim 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 Claim area; or
   iii) people who have rights in relation to the Claim area according to the traditional laws and customs acknowledged by the Native Title Holders; or
   iv) people invited by Native Title Holders to assist in, observe, or record traditional activities on the Claim area.

I am satisfied the claimed native title rights and interests are established prima facie. In considering this matter (including the claim to exclusive native title rights and interests) I have had regard to the information provided by the applicant which I identify in my reasons regarding s. 190B(5).

A comparison of the rights and interests recognised in the *Adnyamathanha (No 2)* determination (as it relates to the Stage 1 determination area) and those claimed in the application reveals that those rights and interests are identical in their terms with one exception. This includes the exceptions and limitations described at Attachment E of the application (referring to things such as the rights being exercisable in accordance with valid laws of the Commonwealth or State of South Australia). The difference between the determination and application is minor; where the term 'claim area' is used in Attachment E of the application, the term 'determination area' is used in the determination.

In relation to the determined native title rights and interests, the Court observed that 'the relationship between the laws and customs of the Adnyamathanha people and the rights and interests claimed by the applicants is demonstrated by the practising of all the rights and interests claimed . . . both by those who still live on the country and by those who make conscious efforts to return to the area and engage in traditional activities' —at [34].

All of the determined native title rights and interests were recognised in the Stage 1 determination area (as well as areas which were determined separately). The Stage 1 area abuts portions of the current application area. I have previously explained that the determination and application refer to the same native title holders/claimants and that comparatively with the determination area, the application area is very small.

I have explained at s. 190B(5)(a), the assertion that the native title claim group have, and its predecessors had, an association with the application area is supported by a sufficient factual basis. None of the claimed or determined rights or interests is uniquely specific to identified areas (other than the exclusive native title rights and interests). In my view, in these circumstances the determination is persuasive evidence which establishes prima facie the claimed rights and interests. Where the claim group has supported the assertion that it has an association with the application area and the Court has determined they are native title holders in an area abutting the application area in relation to identical rights and interests, I am satisfied that it is arguable, and therefore established prima facie, the native title claim group possesses the claimed native title rights and interests in the application area.

Notwithstanding the above, I make the following comments. All of the information before me was also before Mansfield J in *Adnyamathanha (No 2).* I have read that information and outlined some of it within my reasons regarding s. 190B(5) and the claim to exclusive possession, discussed below. I share the view of Mansfield J that that information does refer to the claim group's possession of these rights and interests. As I am satisfied that these are otherwise established prima facie, I do not consider it necessary to set out that information in relation to each right or interest claimed. The information I have referred to elsewhere provides, with one exception, a sufficient summary of the provided material.

The right to possess, occupy, use and enjoy the determination area as against the whole world was recognised in the determination area. Such recognition was only in specific areas where s. 47A was found to apply; this includes localities such as Nepabunna Mission, Mt Serle and Burr Well. I have had regard to a map held by the Tribunal which shows those specific exclusive possession areas.[10] Based on my understanding of the location of the application area in relation to the determination area, those exclusive possession areas are a long way from the application area and are loosely located around the centre of the determination area. As the information I have outlined elsewhere in this decision does not directly address this claimed right, and the Court's determination refers to a specific area a long way from the application area, I have outlined some specific information in this regard.

Claim to exclusive native title rights and interests

1) Subject to paragraph 2, the nature and extent of the native title rights and interests held by all Native Title Holders in relation to the Claim Area are rights to use, stay on and enjoy the land and waters of the Claim Area being:

    a) the right to possess, occupy, use and enjoy the claim area as against the whole world [a footnote is included in the application at this point which states: 'In relation to the land and waters to which sections 47A or 47B apply'];

The nature of exclusive possession was considered by the Full Court of the Federal Court in *Griffiths v Northern Territory of Australia* (2007) (2007) 243 ALR 72; [2007] FCAFC 178 (*Griffiths*). In that case, the Court found a claim to exclusive possession, use or occupation did not require demonstration that a native title claim group could exclude people from their country in a manner analogous to a proprietary right of exclusion:

> The relationship to country is essentially a "spiritual affair" … The question of exclusivity depends upon the ability of [a native title claim group] to effectively exclude from their country people not of their origin—at [127].

Whether a native title claim group possess, prima facie, exclusive native title rights and interests is to be determined by reference to the traditional laws and customs which are said to give rise to those rights. In *Griffiths*, the Court found that the traditional laws and customs of the native title holders included spiritual sanction being visited upon unauthorised entrants to country. The Court further found that through the relevant law and custom, the native title holders were the 'gatekeepers' for the purposes of preventing such harm and avoiding injury to country. On this

[10] This map is entitled SAD 6001/98 Adnyamathanha People Determined and Undetermined Areas, and was prepared by the Tribunal's geospatial services on 17 September 2009 (reference number 20090917_SC99_1_pastoral_topo_A3L).

basis the Court found that the native title holders had exclusive possession under their law and custom: see *Griffiths*—at [127].

The Ellis report explains that Adnyamathanha people possess exclusive native title rights and interests within their country, as mediated by traditional law and custom. The Ellis report sets out those laws and customs in some detail, including their adaptation over time. That information suggests that ownership and/or possession of exclusive native title rights in country are determined by a complex system of interrelated concepts such as a person's moiety, seniority within the society, particular affiliation with tracts of country (which in itself is mediated by a series of laws and customs), knowledge of mura associated with that country and membership to the Adnyamathanha society. see for instance volume 1 —at [301] to [303].

As well as regulating rights and interests internally within Adnyamathanha society, the laws and customs also regulate the entry of non-Adnyamathanha people into country. The Ellis report explains exclusive ownership does not simply refer to or mean a system where defined tracts of country can be identified and said to be Adnyamathanha country to the exclusion of all others. It is a system or concept which is less concerned with prohibiting the use of the resources within country (by both Adnyamathanha people not closely associated with a particular area or by neighbouring groups) than with accommodating cohorts within recognised protocols —volume 2 at [7]. There were many categories and instances of access and use of country.

For example, persons who hold core or contingent rights within a discrete area of country could expect others, who were not particularly associated with that area, to seek permission before utilising that area's resources; members of a different moiety who were of the same dialect group were expected to negotiate their presence and residence within an area. Mr Ellis opines that in such instances, permission was a formality and was more concerned with where a visitor might camp. As another example, members of a neighbouring dialect group were obliged to establish rights of access and use in that area—volume 2 at [356] and [357].

As a final example, Mr Ellis explains that when red ochre expedition groups arrived at a particular boundary point which separated Adnyamathanha country from its neighbours, those expedition groups were expected to send smokes indicating their presence —volume 2 at [376] and [377].

As well as providing information about the varying nature of exclusive possession, the Ellis report also explains that spiritual sanction is believed to be a real consequence where there is a failure to acknowledge restrictions applying to particular areas or taking of resources. Such sanction can affect the offending party and may also bring consequence upon Adnyamathanha people. For instance, if particular bodies of water are accessed incorrectly, they may become salty —volume 2 at [291] to [293].

Information is also provided in the Ellis report about the contemporary experience of Adnyamathanha people in maintaining their possession of exclusive native title rights and interests: see volume 2 —at [130] to [133]. Similar information in this regard is also provided in the other information provided by the applicant.

In his witness statement, [claim group member1] also makes reference to the possibility that a particular waterway will become salty if outsiders, or non-Adnyamathanha people, were to drink

from it. To prevent this, an Adnyamathanha person must obtain the water using a dish and then allow the outsider to drink from the dish —at [41] to [42].

In terms of other sanctions, [Claim group member 1] recalls a time when a dangerous dance was inappropriately performed by outsiders. Upon seeing that dance performed, one of [Claim group member 1's] relatives remarked that she would die and she closed her eyes to avoid watching the dance. Soon after this time, this individual passed away —at [53].

[Claim group member 1] also provides information which suggests that Adnyamathanha people have the ability to cause sanction to be visited upon an area should they so choose. This information particularly relates to the placing of drought sticks within certain areas to cause the country to dry up and make it hotter. Even if the location of these sticks is known, they must be removed by a person of the same moiety as the person who placed the stick —at [65] to [67].

In his preservation evidence, [claim group member 1's] testified that people from other tribes/groups would obtain permission before walking through areas within the Yappala property. This would involve making smokes and/or being led in by Adnyamathanha people —at pp. 281 to 282 and 286.

The summary of witness statements also explains that the statements of [claim group member 4], [claim group member 5] and [claim group member 2] all contain information about the need to seek permission before non-Adnyamathanha people access country. Information is also provided that for areas where Adnyamathanha people have a particular association or interest, they should be consulted about that area even by other Adnyamathanha people.

Based on this information I am satisfied that the claim to exclusive possession is established prima facie. The affidavits explain that there are matters or features within Adnyamathanha country that are dangerous and can cause harm. That harm can only be avoided by complying with the requirements of Adnyamathanha law. In this way, having regard to *Griffiths*, I am satisfied that the affidavits demonstrate that Adnyamathanha people can effectively exclude people from their country and therefore that the claimed right of exclusive possession is established prima facie.

Conclusion

For the above reasons I am satisfied that each of the native title rights and interests claimed are established prima facie.

Subsection 190B(7) Traditional physical connection

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

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

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

  (i) the Crown in any capacity, or

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

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

The application satisfies the condition of s. 190B(7).

In *Doepel* Mansfield J explained the requirement of s. 190B(7) requires evidentiary material which enables the Registrar to be satisfied of particular facts. Primarily, the focus of s. 190B(7) is upon the relationship of at least one member of the native title claim group with some part of the claim area —at [18].

Further, the term 'traditional physical connection', which is not defined in the Act, should be understood as requiring a physical connection to any part of the land and waters subject to the claim 'in exercise of a right or interest in land or waters held pursuant to traditional laws and customs': *Gudjala #2* [2009] —at [84]; *Gudjala #2* [2007]—at [89].

The information provided by [claim group member 1] in his preservation evidence and two witness statements addresses this requirement. As I have elsewhere explained, that evidence is directed towards the application area specifically and Adnyamathanha peoples' access and presence on it.

In particular, [claim group member 1's] preservation evidence refers to locations on the Yappala property where paintings, which were made before settlement of the area, continue to be protected and of importance to members of the claim group today. The requirement to protect and access such sites is asserted to in accordance with traditional laws and customs of the native title claim group. Therefore, access by members of the native title claim group, including [claim group member 1] to this area is a necessary feature of the requirement to protect and care for that area.

Additionally, the Ellis report provides information that members of the native title claim group reside on the Yappala property, which I understand is within the application area: Ellis report — volume 1 at [6] and [8]. I have also explained that I am satisfied that under their traditional laws and customs the native title claim group have the right to possess, occupy, use and enjoy the claim area. Therefore residence within the Yappala property involves a physical connection to parts of the land and waters covered by the application which is in exercise of the right to occupy, use, enjoy and possess the application area.

Having regard to this information I am satisfied that at least one member of the native title claim group has a traditional physical connection with some part of the area covered by this application.

Subsection 190B(8)
No failure to comply with s. 61A

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

Section 61A provides:

(1) A native title determination application must not be made in relation to an area for which there is an approved determination of native title.
(2) If :
(a) a previous exclusive possession act (see s. 23B) was done, and
(b) either:
  (i) the act was an act attributable to the Commonwealth, or
  (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;

a claimant application must not be made that covers any of the area.
(3) If:
(a) a previous non-exclusive possession act (see s. 23F) was done, and
(b) either:
  (i) the act was an act attributable to the Commonwealth, or
  (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.
(4) However, subsection(2) and (3) does not apply if:
(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and
(b) the application states that ss. 47, 47A or 47, as the case may be, applies to it.

For the reasons explained below, I am satisfied the application satisfies the condition of s. 190B(8).

Reasons for s. 61A(1)

Section 61A(1) provides that a native title determination application must not be made in relation to an area for which there is an approved determination of native title.

In their affidavits which were attached to the original application, the applicant deposed to their belief that the area covered by this application was not covered by an approved determination of native title. I have also had regard to the geospatial report which confirms that there is no determination of native title which covers any part of the application area. I have not identified anything which would cause me to disagree with either of these materials.

For these reasons, I am satisfied the application does not offend the provisions of s. 61A(1).

Reasons for s. 61A(2)

Section 61A(2) provides that a claimant application must not be made over areas covered by a previous exclusive possession act, unless the circumstances described in subparagraph (4) apply.

Attachment B(2)(2) of the application confirms that the application does not cover areas where a previous exclusive possession act was done, unless ss. 47, 47A or 47B are applicable — Attachment B(2)(4).

For these reasons, I am satisfied the application does not offend the provisions of s. 61A(2).

Reasons for s. 61A(3)

Section 61A(3) provides that an application must not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area where a previous non-exclusive possession act was done, unless the circumstances described in s. 61A(4) apply.

Attachment E of the application states that exclusive possession is claimed only in areas where s. 47A or s. 47B apply.

Having regard to this information, I am satisfied the application does not offend the provisions of s. 61A(3).

Subsection 190B(9)
No extinguishment etc. of claimed native title

> The application and accompanying documents must not disclose, and the Registrar/delegate must not otherwise be aware, that:
> (a) a claim is being made to the ownership of minerals, petroleum or gas wholly owned by the Crown in the right of the Commonwealth, a state or territory, or
> (b) the native title rights and interests claimed purport to exclude all other rights and interests in relation to offshore waters in the whole or part of any offshore place covered by the application, or
> (c) in any case, the native title rights and interests claimed have otherwise been extinguished, except to the extent that the extinguishment is required to be disregarded under ss. 47, 47A or 47B.

The application satisfies the condition of s. 190B(9), because it meets all of the three subconditions, as set out in the reasons below.

Reasons for s. 190B(9)(a):

The application satisfies the subcondition of s. 190B(9)(a) because Schedule Q of the application contains a statement which confirms that no claim is made in relation to the ownership of minerals, petroleum or gas wholly and validly owned by the Crown.

Reasons for s. 190B(9)(b)

The application satisfies the subcondition of s. 190B(9)(b) because the application area does not cover any offshore areas.

Result for s. 190B(9)(c)

The application satisfies the subcondition of s. 190B(9)(c) because the Attachment B(2) of the application states that all areas where native title rights and interests have otherwise been wholly extinguished are excluded from the application.

[*End of reasons*]

Attachment A
Summary of registration test result

Application name	**Adnyamathanha #3**
NNTT file no.	**SC10/1**
Federal Court of Australia file no.	**SAD69/10**
Date of registration test decision	**11 March 2011**

Section 190C conditions

Test condition	**Subcondition/requirement**		**Result**
s. 190C(2)			**Aggregate result:** **Met**
	re s. 61(1)		**Met**
	re s. 61(3)		**Met**
	re s. 61(4)		**Met**
	re s. 62(1)(a)		**Met**
	re s. 62(1)(b)		**Aggregate result:** **Met**
		s. 62(2)(a)	**Met**
		s. 62(2)(b)	**Met**
		s. 62(2)(c)	**Met**
		s. 62(2)(d)	**Met**
		s. 62(2)(e)	**Met**
		s. 62(2)(f)	**Met**
		s. 62(2)(g)	**Met**
		s. 62(2)(ga)	**Met**

Test condition	Subcondition/requirement		Result
		s. 62(2)(h)	Met
s. 190C(3)			Met
s. 190C(4)			Overall result: Met
	s. 190C(4)(a)		N/A
	s. 190C(4)(b)		Met

Section 190B conditions

Test condition	Subcondition/requirement	Result
s. 190B(2)		Met
s. 190B(3)		Overall result: Met
	s. 190B(3)(a)	N/A
	s. 190B(3)(b)	Met
s. 190B(4)		Met
s. 190B(5)		Aggregate result: Met
	re s. 190B(5)(a)	Met
	re s. 190B(5)(b)	Met
	re s. 190B(5)(c)	Met
s. 190B(6)		Met
s. 190B(7)(a) or (b)		Met
s. 190B(8)		Aggregate result: Met
	re s. 61A(1)	Met
	re ss. 61A(2) and (4)	Met

Test condition	Subcondition/requirement	Result
	re ss. 61A(3) and (4)	Met
s. 190B(9)		Aggregate result: Met
	re s. 190B(9)(a)	Met
	re s. 190B(9)(b)	Met
	re s. 190B(9)(c)	Met