National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION (EDITED)

DECISION-MAKER:	Brendon Moore
Application Name:	The Adnyamathanha People #2
Names of Applicants:	Mr Mark McKenzie, Mr Michael Anderson, Mrs Angelina Stuart, Mr Roger Johnson
Region:	Flinders Ranges, South Australia
NNTT No:	SC 95/001
Federal Court No:	SG 6002/98
Date Application Made:	19 January 1995

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

DECISION

The application is ACCEPTED for registration pursuant to s190A of the Native Title Act 1993 (Cth).

Brendon Moore Date of Decision: 9 July 2004

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

Brief History of the Application

On 22 December 2000, as a result of the ratification of a mediated Framework Agreement (Memorandum of Understanding) between Kuyani and Adnyamathanha, applications SG6002/98, SG6004/98 and SG6001/98 were amended to remove the overlap between them and, in the case of SG6002/98 add additional applicants. In addition and as a consequence, Administrative Decision Judicial Review S45/99 was withdrawn.

On 8 December 2003 the Court gave leave to amend the application and ordered that the amended application filed on 3 December 2003 serve as the amended application. The Court also granted leave for the Notice of Motion filed on 20 December 2002 to prevent the registration test being applied, to be withdrawn.

Information considered when making the Decision

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

- Federal Court Application and NNTT registration test files for this application SG6002/98;
- The NNTT registration test files and applications for the following native title determination applications that overlap the area of this application: SG6011/98 Barngarla;
- Determination of Native Title Representative Bodies: their gazetted boundaries;
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- Schedule of Native Title Applications;
- The National Native Title Register;
- Register of Indigenous Land Use Agreements;

Copies of additional information provided directly to the Tribunal have been provided to the State of South Australia. The provision of this material to the State, with an opportunity to comment, is in the interests of procedural fairness, in line with the decision by Carr J in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*. The State provided no comments on this material.

Note: Information and materials provided in the mediation of any of native title claims made on behalf of this native title group has not been considered in making this decision. This is due to the without prejudice nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislative sections refer to the *Native Title Act 1993* (the Act or NTA) unless otherwise specified.

All references to 'the application' or 'the current application' are to the amended application filed in the Federal Court on 3 December 2003 unless otherwise specified.

A. Procedural Condition

NOTE TO APPLICANT:

To be placed on the Register of Native Title Claims, the application must satisfy *all* the conditions in sections 190B and 190C of the *Native Title Act*.

S190B sets out the merit conditions of the registration test.

S190C sets out the procedural conditions of the registration test ..

In the following decision, the Registrar's delegate tests the application against each of these conditions. The procedural conditions are considered first; then I shall consider the merit conditions

S190C: Procedural Conditions

Applications contains details set out in ss61 and 62: S190C(2)

S190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s190C(2).

Native Title Claim Group: S61(1)

The application is 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.

Reasons relating to this sub-condition

Section 190C(2) of the Act provides that the Registrar must, amongst other matters, be satisfied that the application contains all details and other information required by s.61 of the Act.

In relation to the applicant, see my reasons at s 62 (1)(a)

I must consider whether the application sets out the native title claim group in the terms required by s.61. That is one of the procedural requirements to be satisfied to secure registration: s.190A(6)(b). If the description of the native title claim group in the application indicates that not all persons in the native title group were included, or that it was in fact a sub-group of the native title group, then the requirements of s.190C(2) would

not be met and the claim cannot be accepted for registration (*Northern Territory of Australia v Doepel [2003] FCA 1384 at para 36).*

This consideration does not involve me going beyond the application, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group (*Northern Territory of Australia v Doepel [2003] FCA 1384 at paras 16-17, 37)*.

Schedule A of the current application refers to Attachment A (1) that provides a description of the native title claim group by reference to the "*Adnyamathanha Genealogy*" (a document published by the SA Dept of Environment and Planning, dated September 1985). The description of the native title claim group at Schedule A is as follows:

'All those Adnyamathanha people presently alive who are:

- *named in the Adnyamathanha Genealogy (Attachment A1); or*
- *The descendants, whether biological or adopted, of those so named (including in the case of those adopted, persons adopted pursuant to traditional laws and customs).*'

The genealogy must be read together with Attachment A(2) which is a document entitled *"Spouses in the Adnyamathanha Genealogy who are not Adnyamathanha and should be excluded".* These persons are identified by name and page reference (in the genealogy) and do not form part of the claim group.

I note also that in the introduction to the genealogy there is a disclaimer of the type usually found in such documents, that 'because memories can often be unreliable and records inadequate not all names and dates will be accurate' together with an invitation to readers to assist by providing any further information. Such information could easily add to the claim group. The application at Schedule A specifically deals with the possibility of further adopted persons becoming known, as it says: 'If the applicants become aware at any time of any persons adopted pursuant to traditional laws and customs whose names do not appear in the Adnyamathanha Genealogy, leave will be sought specifically to amend this application by the addition of their names as members of the native title claim group'.

Because these documents may change from time to time, and to preserve those upon which this decision has been made, true copies of the Genealogy and List of non-member spouses have been identified and signed by me and will remain with the file in the possession of the Registrar

At Attachment R, is a certificate by the Aboriginal Legal Rights Movement (ALRM) as the Native Title Representative Body (NTRB) for South Australia and dated 1 December 2003, in which they certify that they are satisfied that the amended application identifies all persons in the Adnyamathanha claim group. They state that there has been no change in the total Adnyamathanha claim area or to the claim group since January 1999 and that the amended applications continue to properly identify those people in the claim group, ' in particular, by relying on the 1985 genealogy' (page 5).

See also my reasons at s190B(3)

I do not have any other information that indicates that this group does not include, or may not include, all the persons who hold native title in the area of the application, or that the certification of the ALRM is in any way invalid. I am satisfied that the group described includes all the persons who, according to their traditional laws and customs hold communal native title that is claimed.

Result: Requirements met

Name and address of service for applicants: S61(3)

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

Reasons relating to this sub-condition

The names of the applicants are listed in part A of the application and part B of the application sets out details of the applicants' address for service.

Result: Requirements met

Native Title Claim Group named/described sufficiently clearly: S61(4)

A native title determination application, or a compensation application, that persons in a native title claim group or a compensation claim group authorise the applicant to make must name the persons or otherwise describes the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons.

Reasons relating to this sub-condition

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

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

Result: Requirements met

Application is in prescribed form: s61(5*)*

An Application must be in the prescribed form, and be filed in the Federal Court, and contain such information in relation to the matters sought to be determined as is prescribed, and be accompanied by any prescribed documents and any prescribed fee

Reasons relating to this sub-condition

The application meets the requirements of s.61(5)(a) in that it is in the form prescribed by Regulation 5(1)(a), Native Title (Federal Court) Regulations 1998.
As required by s.61(5)(b), the amended application was filed in the Federal Court on 3 December 2003.
The application (as amended in January 1999, December 2000 and December 2003) is accompanied by affidavits sworn by each of the applicants as prescribed by s.62(1)(a) and by a map as prescribed by s.62(2)(b).

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

I note that s.190C(2) only requires me to consider details, other information and documents required by s.61 and s.62. I am not required to consider whether the application has been accompanied by the payment of a prescribed fee to the Federal Court.
For the reasons outlined above, it is my view that the requirements of s.61(5) have been met.

Result: Requirements met

Application is accompanied by affidavits in prescribed form: S62(1)(a)

An application must be accompanied by an affidavit sworn by the applicant which addresses the matters required by s62(1)(a)(i) – s62(1)(a)(v)

Reasons relating to this sub-condition

Affidavits of Mr Mark McKenzie, Mr Michael Anderson, Mrs Angelina Stuart, Mr Roger Johnson are attached to the application. Competent witnesses have witnessed these affidavits. They are identical in content and I am satisfied that the affidavits satisfactorily address the matters required by s.62(1)(a) (i)-(v).

S61(1) requires that applicants be members of the native title claim group. Although that is not stated in the affidavits I do note that the persons appear in the genealogy and I therefore accept that they are members of the group.

For reasons outlined above, I have formed the view that the application complies with the requirements of this subsection.

Result: Requirements met

Application contains details set out in s62(2): S62(1)(b)

S62(1)(b) asks the Registrar to make sure that the application contains the information required in s62(2). Because of this, the Registrar's decision for this condition is set out under s62(2) below.

Details of physical connection s: 62) (1)(c

Details of traditional physical connection (information not mandatory) and prevention of access to lands and waters (where appropriate)
Reasons relating to this sub-condition

Schedule M of the application provides details of the traditional physical connection of members of the claim group with the land and waters covered by the application, including details of the association of named applicants with the claim area.

Attachment F of the application contains a general description of the rights and interests claimed, and refers to the factual basis on which the claim group asserts association with the land; the existence of traditional laws and customs giving rise to the claimed native title, and the continuity of that title. Schedule G and Attachment G provide details of activities carried out in the application area.

Result: Provided

Information about the boundaries of the application area: S62(2)(a)

62(2)(a)(i) Information, whether by physical description or otherwise that enables the boundaries of the area covered by the application to be identified;

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information and map in the application are sufficient to enable the area covered by the application to be identified with reasonable certainty.

Result: Requirements met

62(2)(a)(ii) Information, whether by physical description or otherwise that enables the boundaries of any areas within those boundaries that are not covered by the application to be identified.

Reasons relating to this sub-condition

The applicants have provided information identifying the internal boundaries of the area claimed in Attachment B of the application. For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable any areas within the external boundaries of the claim area which are not covered by the application to be identified.

Result: Requirements met

Map of the application area: S62(2)(b)

The application contains a **map showing the external boundaries of the area covered by the application**

Reasons relating to this sub-condition

The applicants have provided a map showing the external boundaries of the area covered by the application at Attachment C of the amended application filed on 22 December 2000. They state at Attachment S of the current application that the unamended Attachment C is not attached to the further amended Form 1. For the reasons that led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the map contained in the application shows sufficiently clearly the external boundaries of the claim area.

Result: Requirements met

Details and results of searches: S62(2)(c)

The application contains details and results of all searches carried out 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

Reasons relating to this sub-condition

Schedule D of the current application and Attachment D of the application filed on 22 December 2000 provide details of searches undertaken by the applicants, including details of leases and gazettal notices within the area of the application. The applicants state at Attachment S of the current application that the unamended Attachment D is not attached to the further amended Form 1.

Result: Requirements met

Description of native title rights and interests: S62(2)(d)

The application contains 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 are all native title rights and interests that may exist, or that have not been extinguished, at law.

Reasons relating to this sub-condition

A description of the native title rights and interests claimed by the applicants is contained in Attachment E of the application. This description does not merely consist 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.

I am satisfied that the conditions of s.62(2)(d) are met. I refer also to the rights and interests claimed in my reasons for decision in relation to s.190B(4) and s.190B(6).

Result: **Requirements met**

Description of factual basis: S62(2)(e)

The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:

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

(ii) there exist traditional laws and customs that give rise to the claimed native title; and

(iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Reasons relating to this sub-condition

In *State of Queensland v Hutchison [2002] FCA 416* Keifel J found that the information required by s.62(2) should form part of the application. This decision is therefore authority

for the proposition that only material that is part of the application can be relied upon in support of compliance with the requirements of s.62(2)(e). Refer also to my reasons for decision under s.190B(5) below.

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

Result: **Requirements met**

Activities carried out in application area: S62(2)(f)

If native title claim group currently carry on any activities in relation to the area claimed, the application contains details of those activities

Reasons relating to this sub-condition

Schedule G and Attachment G of the application provide details of current activities carried out by the claim group in relation to the area of the application. These include:

- camping and erecting shelters in the area;
- hunting, gathering, preparing and cooking bush food, medicinal and other resources in the area;
- maintaining and protecting the natural environment in the area including springs and other water sources;
- conducting meetings and other gatherings in the area;
- educating their children and others in Adnyamathanha culture and heritage associated with the area and otherwise protecting and preserving such culture and heritage;
- taking care of Aboriginal sites and burials in the area;
- trading in certain resources from the area;
- conducting and participating in cultural activities, ceremonies and rituals within the application area;
- taking resources from the area, including fauna, flora, soil, sand, stone, clay, shale, gravel, ochre and water for use and consumption for food, shelter, healing, decoration, cultural, religious, ceremonial and ritual purposes and for manufacture and trade of objects, materials and goods in the form of tools, weapons, artifacts, clothing, shelter and decoration.

Result: **Requirements met**

Details of other applications: S62(2)(g)

The application contains 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 a determination of compensation in relation to native title;

Reasons relating to this sub-condition

At Schedule H of the current application the applicants state that the following applications have been made in relation to the whole or part of the area covered by the application:
SG 6011/98 Barngarla (SC96/4)

This information was confirmed in a search of the Tribunal's geospatial database conducted on 10 March 2004. The search indicated that, as 10 March 2004 and at 7 July 2004, there is one native title determination applications overlapping the current application:

- SG6011/98 Barngarla SC96/4,

There is also material in the Certification document that sets out, pursuant to s203BE(3), details of attempts to achieve agreement about the overlap.

I am satisfied that the details listed in Schedule H and Attachment H of the current application were the details that the applicants were aware of at the time of drafting the amendments to the application.

Result: **Requirements met**

Details of s29 notices: S62(2)(h)

The application contains details of any notices under section 29 (or under a corresponding provision of a law of a State or Territory) of which the applicant is aware, that have been given and that relate to the whole or a part of the area

Reasons relating to this sub-condition

Schedule I of the current application and Attachment I of the application states that there are no notices that the applicants are aware of within the area of the application.

The search of the Tribunal's Geospatial database on 6 April 2004 lists 2 future act notices issued in relation to the area claimed. I note that none of these notices are current and I accept that the applicants have provided information about the notices of which they are aware.

Result: **Requirements met**

Combined decision for s190C(2)

For the reasons identified above the application contains all details and other information, and is accompanied by the documents, required by ss.61 & 62.

Result: **Requirements met**

Common claimants in overlapping claims: S190C(3)

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

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

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

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

Reasons relating to this condition

The application was lodged on 19 January 1995. For the purposes of s.190C(3)(b) it was 'made' on that day.

Section 190C(3) requires me to be satisfied that any person who is a member of the Adnyamathanha native title claim group is not also a member of the native title claim group for any previous native title determination application ('the previous application'), where:

(a) the previous application overlaps in whole or part the claim area covered by the Adnyamathanha #1 application (s.190C(3)(a)); and

(b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the Adnyamathanha #1 application was made (s.190C(3)(b)); and

(c) the entry in the Register was made, or not removed, as a result of consideration of the previous application under s.190A (s.190C(3)(c)).

A search of the Tribunal's geospatial database, as 10 March 2004 and at 8 July 2004, reveals that there is one native title determination applications overlapping the current application:

- SG6011/98 Barngarla SC96/4, lodged 4 April 1996;

The Barngarla application was made after the current application was originally filed on 19 January 1995. So it follows that the Barngarla application was not on the Register when the Adnyamathanha #1 application was made and I therefore do not need to consider this condition any further. I am satisfied that the application meets the requirements of this condition.

Result: Requirements met

Application is authorised/certified: s190C(4)

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

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

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

Note: s.190C(5) – Evidence of authorisation:

If the application has not been certified as mentioned in paragraph (4)(a), the Registrar cannot be satisfied that the condition in subsection (4) has been satisfied unless the application:

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

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

Reasons relating to this condition

This application is certified by the Aboriginal Legal Rights Movement Inc (ALRM) pursuant to s.203BE of the Act. A certificate dated 1 December 2003 is provided as Attachment R to the application. Under this section I am only required to be satisfied that either the conditions of s.190C(4)(a) or of s.190C(4)(b) are met. I have, therefore, limited my consideration to compliance with s.190C(4)(a) – certification by the relevant native title representative body. The requirements of s.190C(4)(b) are not applicable.

A search of the Tribunal's Geospatial database reveals that ALRM is the sole representative body for the region covered by the application. The relevant provisions of Part 11 of the *Native Title Act* for the purposes of this condition are found in s.203BE(1)(a), (2) and (4). They provide:

(1) The certification functions of a representative body are:
(a) to certify, in writing, applications for determinations of native title relating to areas of land or waters wholly or partly within the area for which the body is the representative body;

(2) A representative body must not certify under paragraph(1)(a) an application for a determination of native title unless it is of the opinion that:
(a) all the persons in the native title claim group have authorised the applicant to make the application and to deal with matters arising in relation to it; and
(b) all reasonable efforts have been made to ensure that the application describes or otherwise identifies all the other persons in the native title claim group.

(3) If the land and waters covered by the application are wholly or partly covered by one or moiré applications (including proposed applications) of which the representative body is aware, the representative body must make all reasonable efforts to:
(a) achieve agreement relating to native title over the land or waters, between the person in respect of whom the applications are, or would be made;
(b) minimise the number of applications covering the land or waters.

However a failure by the representative body to comply with this subsection does not invalidate any certification of the application by the representative body.

(4) A certification of an application for a determination of native title by a representative body must:

(a) include a statement to the effect that the representative body is of the opinion that the requirements in paragraphs (2)(a) and (b) have been met; and
(b) briefly set out the body's reasons for being of that opinion; and
(c) where applicable, briefly set out what the representative body has done to meet the requirements of subsection (3).

The certification by ALRM is in writing and signed by an apparently authorised delegate. I am satisfied therefore that the first requirement in s.203BE, found in subparagraph (1)(a), is met.

The second requirement in s.203BE is that the representative body must not certify a native title determination application unless it holds the opinions found in subparagraphs (2)(a) and (b).

In relation to s.203BE(2)(a), the certification provides a detailed history of the application, including details of the Adnyamathanha Special General Meeting of the Adnyamathanha Traditional Lands Association (ATLA) and the Adnyamathanha community meeting held in Copley and Port Augusta on 21 and 22 July 2003 at which the existing authority of the named applicants in the Adnyamathanha No 1 and No 2 claims to deal with matters arising in relation to those applications was confirmed by way of resolution. I note that four ALRM staff members attended this meeting, and in the certificate the ALRM state that they are satisfied that all people in the native title claim group as well as the applicants were represented at the time authority was given. In relation to authorisation of the current application, ALRM concludes:
'*ALRM is satisfied that the members of the Adnyamathanha native title claim group attending the meetings of 21 and 22 July 2003 confirmed the authority of Mark McKenzie, Angelina Stuart, Michael Anderson and Roger Johnson, to make the Adnyamathanha No 2 application and to deal with matters arising in relation to it on behalf of all the other persons in the Adnyamathanha claim group in accordance with s.251B(b) of the NTA. There was no traditional decision making process for the purposes of s.251B(a) of the NTA.*'

In relation to s.203BE(2)(b), the certificate states:
'*ALRM is of the opinion that all reasonable efforts have been made by or on behalf of the applicants to ensure that the applications describe or otherwise identify all persons in the Adnyamathanha claim group.*

ALRM notes that there is no change to the total Adnyamathanha claim area or to the claim group since January 1999. As was the case with the No 1 application lodged in 1999 and its certification, the amended applications continue to properly identify those people in the claim group, in particular, by relying on the 1985 genealogy.'

In relation to the requirements of s.203BE(3) regarding overlapping applications, the ALRM provide details of the efforts made to resolve and the successful resolution of the

overlap with the Kuyani claim and of meetings held to address the overlaps with the Barngala claim.

The representative body must not certify under this section, if it is of the opinion that proper authorisation has not occurred. The ALRM have provided, pursuant to s203BE(4), an opinion that proper authorisation has occurred, and their reasons for being of this opinion, and details of their attempts to satisfy s203BE(3).

Therefore I am satisfied that the ALRM have met their requirements under the Act and that the applicants have authority to lodge this application and deal with matters arising in relation to it.

Result: Requirements met

Merits Conditions: s190B

Identification of area subject to native title: S190B(2)

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

Reasons relating to this condition

Map and External Boundary Description:

At Schedule B of the application the applicants provide a written description of the external boundary of the area covered by the application by reference to sections contained within the Flinders Ranges National Park. The State of SA in their submission dated 2 April 2004, identify a typographical error in Schedule B that defines the area of the Flinders Ranges National Park by including reference to 'Out of Hundreds (Parachilna) s999'. The State submit that the actual section number should be '9**8**9'. I note Schedule B states that the

area of the application "…*comprises the whole of the land proclaimed under the National Parks and Wildlife Act 1972 as the Flinders Ranges National Park.*" The applicants then state that the land proclaimed includes a number of listed sections. I accept' under the slip rule' that 's999 Out of Hundreds (Parachilna)' listed at Schedule B was intended to read 's9**8**9 Out of Hundreds (Parachilna)'.

Attachment C to the application provides a map depicting the external boundary of the claim area. The map was prepared by the State of SA and shows longitude and latitude in decimal degrees.

In the Geospatial assessment dated 12 August 2002 the Tribunal's Geospatial Unit confirmed that the description of the external boundaries and the map is sufficient to meet the requirements of s.62(2) and s.190B(2) and describes the application area with reasonable certainty. It follows that I am satisfied that the external boundaries of the claim area can be identified with reasonable certainty, having regard to the written description and the map contained in the application.

I am satisfied that the physical description of the external boundaries meets the requirements of s.62(2)(a)(i) and that the map complies with the requirements of s.62(2)(c).

Internal Boundaries

The internal boundaries of the application are defined in Schedule B and Attachment B of the application. Attachment B provides a formula for identifying the areas of land and waters within the application area that are not covered by the application, as follows:

(1) Subject to (4), the applicants exclude from the application area any areas in relation to which any of the following acts have taken place:

(a) category A past acts (see section 229 NTA);

(b) category A intermediate period acts (see section 232B NTA);

(c) category B past act that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests (see section 230 NTA);

(d) category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests (see section 232C NTA).

(2) Subject to (4), the applicants exclude from the application area any areas in relation to which:

(a) a "previous exclusive possession act", as defined in section 23B of the NTA, was done and the act was an act attributable to the Commonwealth; or

(b) a "previous exclusive possession act", as defined in section 23B of the NTA, was done and the act was attributable to the State of South Australia and

was not an "excepted act", as defined in section 36F of Native Title (South Australia) Act 1994 (SA).

(3) Subject to (4), the applicants also exclude from the application area areas in relation to which native title rights and interests have otherwise been wholly extinguished.

(4) The application area includes any area in relation to which the non-extinguishment principle (as defined in section 238 of the NTA) applies, including any area to which section 47, 47A or 47B of the NTA applies.

It is my view that the description of areas excluded by class can be objectively applied to establish whether any particular area of land or waters within the external boundary of the application is within the claim area or not. This may require considerable research of tenure data held by the particular custodian of that data, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicants. Accordingly I consider that the description provides a reasonable level of certainty in regard to whether native title rights and interests are claimed in relation to particular areas of land or waters within the external boundaries of the area subject to the application.

Result: Requirements met

Identification of the native title claim group: S190B(3)

The Registrar must be satisfied that:

(a) the persons in the native title claim group are named in the application; or

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

Reasons relating to this condition

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

A list of names of all the persons in the native title claim group has not been provided in the application, therefore the requirements of s.190B(3)(a) are not met. In the alternate s190(3)(b) requires me to be satisfies that the persons in the claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

Schedule A of the application provides a description of the native title claim group as all those Adnyamathanha people presently alive who are named in the "*Adnyamathanha Genealogy*" (published in 1985 by the Aboriginal Heritage Branch of the SA Department of Environment and Heritage), provided as Attachment A(1) or who are descendants, whether biological or adopted of those whose names appear in the document. Attachment A(2) sets out an exhaustive list of the names of non-Adnyamathanha spouses who appear in the Genealogy but who are not included in the native title claim group. The applicants clearly state in Schedule A that these non-Adnyamathanha spouses are the only non-Adnyamathanha whose names appear in that document, and that they are not included in the native title claim group.

In relation to the persons who have been adopted into the native title claim group I would have preferred to see further information regarding the traditional laws and customs by which people are adopted into the native title claim group. However, I note the following statement in Schedule A:

'*Those adopted pursuant to traditional laws and customs: all such adopted persons are named in the Adnyamathanha Genealogy in the same way as those named in that document who are biological descendants of named apical ancestors. There are accordingly no such adopted descendants who are not named in the Adnyamathanha Genealogy. If the applicants become aware at any time of any persons adopted pursuant to traditional laws and customs whose names do not appear in the Adnyamathanha Genealogy leave will be sought specifically to amend this application by the addition of their names as members of the native title claim group. For the avoidance of doubt, pending any such leave being obtained, such persons are not members of the native title claim group.*'

I am satisfied that this statement provides sufficient certainty in identifying persons who have been adopted into the native title claim group.

In their letter dated 2 April 2004 the State of South Australia, referring to both the Adnyamathanha #1 and Adnyamathanha #2 applications, stated '*Given the complicated history of the matter (including amalgamation of various claims), I would ask that you ensure that all members of any previous native title claim groups which have combined to form the current claims are in fact included in the native title claim groups as defined'*. I have considered the descriptions of the native title claim group and the named applicants in each of the following pre-combination applications:

SC94/1 – Coulthard/Adnyamathanha –
Applicants: G.S. Coulthard, A. Coulthard, A. Stuart – [all listed in Adnyamathanha Genealogy]
D Coulthard - listed in application SC99/1 - A2 as Spouse excluded from claim group.
Claim Group: Adnyamathanha People

SC95/3 – Stuart/McKenzie
Applicants: Angelina Stuart, Dawn Stuart, Don McKenzie, Maude McKenzie, Corrina Stuart (listed as Corrinia in Genealogy), Aaron Stuart, Noleen (spelt Nobeline in genealogy and on affidavit dated 21 February 1995 to original application), Jaqueline Crawford (nee McKenzie, listed as McKenzie in the Genealogy) – [all listed in Adnymathanha Genealogy]

Claim Group: Descendants of a named individual who died 1 June 1974 (listed at p. 10 of Adnyamathanha Genealogy)

SC95/6 – Paterson/McKenzie
Applicants: Annette Wilton, Beverley Paterson, Don McKenzie, Irene McKenzie, Stuart Paterson (spelt Stewart in the Genealogy), [all listed in Adnyamathanha Genealogy]
Claim Group: Adnyamathanha Aboriginals of the Flinders Ranges.

SC97/1 – Anderson/Adnyamathanha (withdrawn 18/1/99)
Applicants: Geraldine (Thathy) Anderson, [listed in Adnyamathanha Genealogy]
Claim Group: Adnyamathanha Peoples

SC97/2 – Adnyamathanha (withdrawn 18/1/99)
Applicants: May Buzzacott, Vincent Coulthard, Angelina Stuart,
Gertie Johnson, Gordon Coulthard, Stuart Patterson, [all listed in Adnyamathanha Genealogy]
Claim Group: Adnyamathanha People

SC95/1 – Kuyani #1 (pre-amendment 12/12/00)
Applicant: Mark McKenzie [listed in Adnyamathanha Genealogy]
Claim Group: On behalf of the Kuyani people including, but not limited to the following families, Bardy, Clark, Coulthard, Davies, Davis, Demell, Forbes, McKenzie, Pondi, Richards, Ryan, Stuart, Stubbs and Wilton. [all listed in Adnyamathanha Genealogy, except for the Davies family]

I note that the Davies family listed on the pre-amendment SC95/1 Kuyani application are not listed within the Adnyamathanha Genealogy. However I also note that the current Kuyani application SG6004/98 (SC00/3) also does not include the Davies family in their claim group description. In addition, as outlined in my reasons at s190B(4) in the certificate at Schedule R the ALRM state that they are satisfied that all people in the native title claim group as well as the applicants were represented at the time authority was given. In relation to authorisation of the current application, ALRM concludes:
'*ALRM is satisfied that the members of the Adnyamathanha native title claim group attending the meetings of 21 and 22 July 2003 confirmed the authority of Mark McKenzie, Angelina Stuart, Michael Anderson and Roger Johnson, to make the Adnyamathanha No 2 application and to deal with matters arising in relation to it on behalf of all the other persons in the Adnyamathanha claim group in accordance with s.251B(b) of the NTA. There was no traditional decision making process for the purposes of s.251B(a) of the NTA.*'In relation to s.203BE(2)(b), the certificate also states:
'*ALRM is of the opinion that all reasonable efforts have been made by or on behalf of the applicants to ensure that the applications describe or otherwise identify all persons in the Adnyamathanha claim group.*

I am satisfied that all the named applicants in the above applications, and the apical ancestor in application SC95/3 are included in the Adnyamathanha Genealogy and therefore in the description of the native title claim group in the current application.

I am satisfied that the description in the application constitutes an objective means of verifying the identity of members of the claim group so that it can be ascertained whether any particular person is in that group and therefore meets the requirements of s.190B(3) (b).

Result: **Requirements met**

Native title rights and interests are readily identifiable: S190B(4)

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

Reasons relating to this condition

A list of 30 rights and interests are asserted in relation to the claim area. For further details of the rights and interests claimed refer to my reasons for decision under s.190B(6) below.

Land Tenure in the application area*:*
At Schedule B the applicant's state that the area covered by the claim comprises the whole of the land proclaimed under the National Parks and Wildlife Act 1972 as the Flinders Ranges National Park.

At Attachment E the applicants clarify that the native title rights and interests claimed are subject to:
i the laws of the Commonwealth and State of South Australia, including the common law;
ii valid interests conferred under those laws; and
iii traditional laws and customs under which their rights and interests are possessed.

At Attachment B the applicants state that ;
(1) Subject to (4), the applicants exclude from the application area any areas in relation to which any of the following acts have taken place:

(a) category A past acts (see section 229 NTA);

(b) category A intermediate period acts (see section 232B NTA);

(c) category B past act that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests (see section 230 NTA);

(e) category B intermediate period acts that are wholly inconsistent with the continued existence, enjoyment or exercise of any native title rights or interests (see section 232C NTA).

(2) Subject to (4), the applicants exclude from the application area any areas in relation to which:

(a) a "previous exclusive possession act", as defined in section 23B of the NTA, was done and the act was an act attributable to the Commonwealth; or

(b) a "previous exclusive possession act", as defined in section 23B of the NTA, was done and the act was attributable to the State of South Australia and was not an "excepted act", as defined in section 36F of Native Title (South Australia) Act 1994 (SA).

(3) Subject to (4), the applicants also exclude from the application area areas in relation to which native title rights and interests have otherwise been wholly extinguished.

(4) The application area includes any area in relation to which the non-extinguishment principle (as defined in section 238 of the NTA) applies, including any area to which section 47, 47A or 47B of the NTA applies.

The applicants further qualify the native title rights and interests claimed. At Schedule Q the applicants state that no claim is made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by the Crown under valid laws of the Commonwealth or State. I also note that para. (d) of Attachment E states that resources do not include minerals (as defined in the *Mining Act 1971* (SA)) other than extractive minerals recovered for his or her own personal use by a person who holds native title in the land, or petroleum (as defined in the *Petroleum Act 1940* (SA)). At Schedule P the applicants indicate that they do not claim exclusive possession of any offshore places.

With regard to the qualifications to the rights and interests claimed as set out in Attachment E to the application I note that Mansfield J in *Doepel* found that in applying s. 190B(4) it was a matter for the Registrar to exercise his judgement upon the expression of the native title rights and interests claimed and that it was open to the Registrar to read the application as a whole and to conclude that the rights and interests were readily identifiable, subject to certain qualifications to the rights and interests claimed set out in Schedule E of that application – at [123].

The requirements of the Act

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description of the claimed native title rights and interests contained in the application is sufficient to allow the rights and interests to be readily identified, i.e. that they can be quickly and easily recognised or established as a claimed native title right and interest. For the purposes of the condition, then, only the description contained in the application can be considered.[1]

[1] *Queensland v Hutchinson* (2001) 108 FCR 575.

Section 62(2)(d) requires that the application contain '*a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law*.' This terminology suggests that the legislation is intended to screen out of applications native title rights and interests that are vague, or unclear.

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

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

Some interests which may be claimed in an application may not be native title rights and interests and thus will not be 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s.223. Rights which are not readily identifiable include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,[2] rights to minerals and petroleum under relevant Queensland legislation,[3] an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.[4]

The rights at paras 29 and 30

At paras 29 and 30 the applicants claim the following rights.

- *(29) the right to maintain, conserve and/or protect significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing (by all reasonable lawful means) any activity occurring on the area which may desecrate, damage, disturb or interfere with any such ceremony, artwork, song cycle, narrative, belief or practice* (para 29 right)*;*

- *(30) the right to prevent (by all reasonable lawful means) any use or activity within the area which under traditional laws and customs is unauthorised or inappropriate in relation to significant locations, sites or objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area* (para 30 right)*.*

[2] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
[3] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[4] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

The State's submission

The State of South Australia provided comments in relation to the right claimed at para 30. In a letter dated 2 April 2004 the Crown Solicitor raises the question of whether the para 30 right 'is expressed in a way that might come into conflict with the comments of the High Court in *Ward*'. The Crown Solicitor's letter states:

> "While the right sought is, at first glance, more confined than that discussed in *Ward* …[the right] could nevertheless be seen to include rights akin to intellectual property. The 'unauthorised or inappropriate' use of 'artworks, song cycles, narratives or beliefs' is very broad, even when it is sought to confine it to the 'area'.

The Crown Solicitor does not raise issue with the right at para 29.

Submission on behalf of the applicant

The applicants were given the opportunity to respond to the State's submission. They provided the Tribunal with a memorandum of advice of G McIntyre SC.

The applicant's submission gives a brief analysis of the majority judgment of the High Court in *Ward* in respect of the right to protect and prevent misuse of cultural knowledge, and in relation to the right at para 30, concludes:

> '*There is nothing in the way in which the right is expressed which brings it into conflict with the comments of the High Court in Ward .The principal thrust of the right is as a right to take lawful steps to prevent unauthorized or inappropriate activities within the area of the native title which have an impact on things within the area or activities carried out within the area*.'

The applicant's submission argues that:

- a right which has the necessary relationship to or connection with the land or waters may have within it intellectual elements and be a native title right protected by the NTA. It is only if –
  (a) the right is comprised purely of an intellectual element, or
  (b) the knowledge or intellectual element can be totally isolated from the place which is the subject of the native title

  that it will not be a manifestation of a native title right because it is a mere intellectual property right with no connection to the land or waters the subject of the native title.

  For example, when the High Court in Ward, at [59], said that "respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at sites answer the requirement of connection with land found in par (b) of the definition in s 223(1) of the NTA" it was acknowledging that native title rights may exist in relation to sites or events on the land. In this regard, matters of art and ceremony have a mixture of intellectual and physical manifestation.

- Olney J in *Yarmirr v Northern Territory*, [1998] 771 FCA, at [162], found that a claimed right to protect places of cultural and spiritual importance was made out in that case. He found, at [125] that, according to the traditional laws and customs of the community, community members have rights and obligations in relation to sites

within the claimed area, which they are required to protect from unauthorised and inappropriate use. He found, at [124], that:

> *'There are strict and complex rules of access and behaviour at many of these dangerous sites which, if observed properly, will protect visitors and others from supernatural danger. It is the duty of the senior yuwurrumu male to ensure that people are aware of these rules and behaviours and, to protect both them and others from the dire consequences that can flow from inappropriate behaviour'*.

The High Court in *Ward*, at [53], suggested that where 'according to traditional law and culture, there is a right to control access to land, or to make decisions as to its use, but that right is not an exclusive right' then 'it requires close attention to the statement of the relationship between the native title rights and interests and the other interests relating to the determination area': see NTA s. 225(d). Native title rights may include a right to control behaviour in relation to places of significance in accordance with traditional laws and customs which has no direct impact on other interests.

- the right expresses its connection to, or relationship with, the land and waters. Firstly, it relates only to the prevention of a use or activity within the area of land and waters claimed. Secondly, it relates to –
  (a) locations, sites or objects within the area; or
  (b) ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area.

  The right does not relate to a 'belief' held in intellectual isolation, rather it relates only to a belief having some physical expression carried out within the area. It is the activity of carrying out the belief within the area, by some form of ritual or other act which occurs within the area, which comprises the native title right.

Consideration

I note that neither the applicant's or State's submissions refer to recent Federal Court decisions which considered rights in relation to cultural knowledge, including rights framed in similar terms to those claimed in the current application. I will first consider the *Ward* decision, then refer to a number of relevant decisions post-*Ward*.

High Court in *Ward* – 'right to maintain, protect and prevent misuse of cultural knowledge' not established

The majority of the Full Court of the Federal Court in *Ward* (2000) 99 FCR 316 at 483, found as follows in respect of the right to 'maintain, protect and prevent misuse of cultural knowledge of the common law holders associated with the determination area'–

> '*Although the relationship of Aboriginal people to their land has a religious or spiritual dimension, we do not think that a right to maintain, protect and prevent the misuse of cultural knowledge is a right in relation to land of the kind that can be the subject of a determination of native title*'.

This finding was the subject of a ground of appeal to the High Court.

The majority of the High Court in *WA* v *Ward* [2002] HCA 28, at [57]-[60], took the view that the scope of the right asserted went beyond the content of the definition of native title

or native title rights and interests in s. 223(1). The court considered that what was asserted was '*something approaching an incorporeal right akin to a new species of intellectual property*', the recognition of which would extend beyond denial or control of access to land held under native title. In so finding the court took the view that it appeared to involve, for example, *'the restraint of visual or auditory reproductions of what is found or takes place in the claim area or elsewhere';* and said:
'respecting access to sites where artworks on rock are located, or ceremonies are performed, the traditional laws and customs which are manifested at sites answer the requirement of connection with land found in par (b) of the definition in s 223(1) of the NTA'.

On the basis of this finding, a right to control the use of cultural knowledge that goes beyond the right to control access to land or waters is not readily identifiable as a native title right.

A number of decisions subsequent to the High Court's decision in *Ward* have considered various claims concerning cultural knowledge, with varying views as to whether such claims can be established under s.223 of the NTA. These decisions need to be considered with a measure of caution, in that a number of them arise from either consent determinations or from hearings held to settle the contents of determinations and the views expressed by the Court must be considered in the light of the particular evidence in each case.

Daniel v WA [2003] FCA 666

This decision considered rights relating to cultural knowledge framed in terms analogous to those claimed in the current application. These rights were:

- *(p) Maintain and protect cultural knowledge*
  A right to maintain, conserve and/or protect from injury, desecration, damage, destruction or alteration and prevent the misuse of ceremonies, artworks, song cycles, narratives, beliefs or practices which have social, cultural, religious, spiritual, ceremonial, ritual or cosmological importance or significant to the native title holders, by preventing by all reasonable means any activity occurring on the area which may injure, desecrate, damage, destroy, alter or misuse any such ceremony, artwork, song cycle, narrative, belief or practices.

- *(q) Protect places and objects from inappropriate use*
  A right to maintain, conserve and/or protect by all reasonable lawful means places and objects located within the area of social, cultural, religious, spiritual, ceremonial, ritual or cosmological significance to the native title holders from use or activities which are unauthorised or inappropriate use or activities, in accordance with the traditional laws and customs of the nat8ive title holders.

Regarding the right at (p) above, Nicholson J., citing the High Court majority in *Ward*, accepted the state's submission that such claim 'asserts cultural knowledge going beyond what can be claimed as part of native title'. His Honour did not give any additional detail in his reasons as to the basis upon which he did not accept the right as validly claimed – at [300] and [497].

This right is drafted in similar terms to the right at para 29 in the current application, except that this right, unlike that in *Daniel*, does not incorporate the concept of 'prevention of misuse' of ceremonies, artworks, song cycles, narratives, beliefs or practices (referred to hereafter as 'the cultural beliefs and undertakings'). The rights at paras 29 and 30 are both expressly premised on a right to prevent certain activities occurring in the area of land and waters claimed, on which basis there is arguably a requisite connection with the land or waters claimed. It might be arguable that the concept of prevention of misuse incorporated in the right considered in *Daniel* encompasses rights akin to intellectual property rights, such as the restraint of visual or auditory reproductions of what is found or takes place in the claim area. Given that the right at para 29 does not extend to the prevention of misuse of the cultural beliefs and undertakings, it is my view that it can be distinguished from that in *Daniel* and does not go beyond the right to control access to or the use of land or waters. In any event, I note that the State has not made a submission in respect of the para 29 right.

Regarding the second right above considered in *Daniel*, Nicholson J, again citing the High Court in *Ward*, found that the aspects of this claim relating to cultural knowledge could not be maintained and, to the extent that the claim was an assertion of a right to control others imparting traditional knowledge it could not be maintained.

The right at para 30 is arguably more confined than that in *Daniel* in that it relates not only to the prevention of a use or activity within the area of land and waters claimed, but is also confined to significant locations, sites or objects within the area, or cultural beliefs and undertakings carried out within the area. It is on this basis that the applicant's submission argues that the right expresses the necessary connection to, or relationship with, the land and waters and is therefore not contrary to *Ward*.

De Rose v South Australia [2002] FCA 1342

O'Loughlin J. considered a claimed right expressed in the following terms:

> *'the right to prevent the disclosure otherwise than in accordance with traditional laws and customs of tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters'*

His Honour, having referred to the decisions of the Full Federal Court and High Court in *Ward*, concluded:

> '*In this case the claimed right, according to the claimants, was a limited right confined to disclosure of tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters. I cannot see that there is a distinction. The decisions in the Full Court and the High Court have made it clear that matters of spiritual beliefs and practices are not rights in relation to land and do not give the connection to the land that is required by s. 223 of the NTA'*.

The right expressed here is clearly distinguishable from rights 29 and 30 in the present application. One seeks to 'prevent the disclosure…of tenets of spiritual belief", whereas the key words in *(29)*speak of ' *the right to maintain, conserve and/or protect ... by preventing (by all reasonable lawful means) any activity occurring on the area which*

may desecrate' etc. This, to me, is a clear expression of a right in property. Similarly, the key wording in *(30)*is ' *the right to prevent (by all reasonable lawful means) any use or activity within the area…'* That the holders of the right might wish to control certain behaviours because of their cultural beliefs is irrelevant: it is the right to control behaviours on land that is significant. For example, a landowner selling a parcel of land subject to a covenant that an area of ancient graves upon it is not to be interfered with is undoubtedly exercising a property right, notwithstanding that the reason for the imposition of the covenant might be wholly spiritual.

NT v Doepel

Mansfield J accepted the Registrar's finding, on the basis of the High Court decision in *Ward* at [64], that the following claimed right was not readily identifiable as a native title right or interest:

> *to maintain, protect, prevent the misuse of and transmit to others their cultural knowledge, customs and practices associated with the application area, where the traditional law acknowledged and customs observed have a connection with the application area.*

Neowarra v WA [2003] FCA 1402

In this case the applicant sought recognition of the right:

> *to prevent the disclosure otherwise than in accordance with traditional laws and customs [of] tenets of spiritual beliefs and practices (including songs, narratives, rituals and ceremonies) which relate to areas of land or waters, or places on the land or waters.*

Sundberg J found:

> '*The reformulation does not avoid the "fatal difficulty" to which the joint judgment (of the High Court in Ward) referred at [60]. It will still involve the "restraint of visual or auditory reproductions of what was found [on the land] or took place there*" – at [487].

Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim group v Northern Territory [2004] FCA 472

In this determination that native title exists, handed down on 23 April 2004, Mansfield J. took a more liberal approach in relation to (amongst other things) a claim concerning protection of cultural knowledge framed in essentially similar terms to those not accepted by Sundberg J in *Neowarra* and Olney J in *De Rose*.

In *Alyawarr*, Mansfield J determined that the following right, including the right to conduct activities incidental to it, existed:

> *(h) the right to control the disclosure (otherwise than in accordance with traditional laws and customs) of spiritual beliefs or practices, or of the paraphernalia associated with them (including songs, narratives, ceremonies, rituals and sacred objects) which relate to any part of or place on the land or waters*

His Honour stated:

> *'I consider that the right claimed in (h) is one which has a connection with the claim area, so as to come within the definition in s 223(1) of the NT Act. The critical question dictated by s.223(1)(b) is whether the claim group, by the traditional laws and customs which give rise to the particular native title rights and interests, has a connection with the claim area. The expression of the claimed right is more refined, or more specifically directed to meeting the requirement of s 223(1)(b), than those considered by the High Court in Ward at 31 – 32, [58] – [60] or by O'Loughlin J in De Rose at [51]. The evidence discloses that certain of the spiritual beliefs or practices of the claim group are 'site specific', and the activities conducted pursuant to them relate to particular locations in the claim area. As expressed, the proposed right firstly relates only to the spiritual beliefs which concern particular locations in the claim area. And secondly, it seeks to 'control' the disclosure of those beliefs and the material objects and other 'paraphernalia' associated with them. It is not directed to controlling the use of some intellectual property, but to controlling its acquisition. I am confident there is a right to control the acquisition of such information in accordance with traditional laws and customs of the claim group. By the 'site specific' nature of those particular spiritual beliefs, in my view the claim group has a connection with the claim area. As expressed, I do not consider the right is 'something approaching an incorporeal right akin to a new species of intellectual property'* (cf the majority in Ward)' – at [324]

Conclusion

It is my view that the rights at para 29 and para 30 are readily identifiable within the meaning of s. 190B(4); in other words they are understandable and have meaning. On balance, both can be distinguished from the High Court's comments in *Ward* and fall within the scope of s.223 of the NTA. The requirements of s. 190B(4) are therefore met.

To summarise: I have reached this view in relation to rights 29 and 30 on the following basis:

- both rights can arguably be distinguished from those considered in *Daniel* – see my comments above.
- both the rights relate to preventing activities on the area claimed which have an impact on things within the area (such as sites, locations, objects or artworks) or activities carried out within the area. They therefore have the requisite connection with the land or waters claimed and are rights in land.
- Even if that is not so, to the extent that either or both rights may relate to the protection of spiritual beliefs and practices – such a right has been accepted by Mansfield J in *Alyawarr* as one falling within the scope of s. 223. Specifically, Mansfield J found that the right to control the disclosure of spiritual beliefs or practices, or of 'the paraphernalia associated with them':
    - related only to the spiritual beliefs which concern particular locations in the claim area;
    - was 'not directed to controlling the use of some intellectual property, but to controlling its acquisition'. It is arguable that this would, at least in part, include the prevention of activities on the area that may be detrimental to spiritual or cultural beliefs or practices, or unauthorised or inappropriate under traditioanl law and custom in relation to spiritual or

cultural beliefs or practices – for example, persons seeking to enter the area to film a sacred site.

I am satisfied that the remainder of the rights and interests claimed are also readily identifiable.

Conclusion
I am satisfied that the native title rights and interests claimed in Attachment E are readily identifiable. The application meets the requirements of s.190B(4) and s.62(2)(d).

I am satisfied that the remainder of the rights and interests claimed, are also readily identifiable.

Result: Requirements met

Factual basis for claimed native title: S190B(5)

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

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

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

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

Reasons relating to this condition

To satisfy the requirements of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s.62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. I will therefore have regard to the application as a whole; subject to s.190A(3), I will also have regard to relevant information that is not contained in

the application. The provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is not a requirement that the Registrar (or his delegate) undertake a search for this material: *Martin v Native Title Registrar* per French J at [23].

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J. said that '*[s]ection 190B(5) may require more than [s.62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it.*'

For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.[5]

In *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (the *Yorta Yorta* decision), the majority of the High Court noted that the word 'traditional' refers to a means of transmission of law or custom, and conveys an understanding of the age of traditions. Their Honours said that 'traditional' laws and customs are those normative rules which existed or were 'rooted in pre-sovereignty traditional laws and customs': at [46], [79]. This normative system must have continued to function uninterrupted from the time of acquisition of sovereignty to the time when the native title group sought determination of native title. This is because s.223(1)(a) speaks of rights and interests as being 'possessed' under traditional laws and customs, and this assumes a continued 'vitality' of the traditional normative system. Any interruption of that system which results in a cessation of the normative system would be fatal to claims to native title rights and interests because the laws and customs which give rise to the rights and interests would have ceased to exist and could not be effectively reconstituted even by a revitalisation of the normative system. Their Honours noted, however, that this does not mean that some change or adaptation of the laws and customs of a native title claim group would be fatal to a native title claim; rather that an assessment would need to be made to decide what significance (if any) should be attached to the fact that traditional law and custom had altered. In short, the question would be whether the law and custom was 'traditional' or whether it could *'no longer be said that the rights and interests asserted are possessed under the traditional laws acknowledged and the traditional customs observed by the relevant peoples when that expression is understood in the sense earlier identified*' - at [82] and [83].

These statements in the *Yorta Yorta* decision are of assistance in interpreting the terms 'traditional laws', 'traditional customs' and 'native title rights and interests', as found in s.190B(5). However, I am also mindful that the 'test' in s.190A involves an administrative decision – it is not a trial or hearing of a determination of native title pursuant to s.225, and it is therefore not appropriate to apply the standards of proof that would be required at such a trial or hearing.

If the application is to meet the requirements of this subsection I must be satisfied that there is a sufficient factual basis to support the assertion that 'the native title rights and interests claimed exist', and the particular assertions at s.190B(5)(a), (b) and (c).

[5] See *Ward* at [382].

The applicants provide material in support of s.190B(5) at Schedules G and M and Attachments F and G. The applicants have provided considerable additional material to support this section of the test, including the following published documents and affidavits sworn by three members of the native title claim group.

Fol	Date	Description
6	29/8/98	*Advertiser*, Revival of land's flora and fauna, p38
7	6/10/98	*Advertiser*, Scars run deep after sacred site burn-off, p11
8	6/1/98	*Advertiser,* How this scared land made history, np.
9	1985	Brock, P*, Yura and Udnya – A History of the Adnyamathanha of the North Flinders Ranges.*
10	1992	Education Dept. of SA*, The Adnyamathanha People of the Flinders Ranges.*
11	1994	Dept. Environment and Natural Resources (DENR), *Interpreting Rock Art of the Flinders Ranges.*
12		Dept. Environment and Natural Resources (DENR), *Gammon Ranges National Park (brochure).*
13	1980-1986	Dept. Environment and Planning, *The Flinders Ranges – An Aboriginal View*
14	1996	Dept. Environment and Planning, *Draft Management Plan – Gammon Ranges National Park (excerpts)*
15	1986	McEntee, J (with Pearl and John McKenzie)*, Witi – Ita – Nanalpila Plants and Birds of the Northern Flinders Ranges and Adjacent Plains with Aboriginal Names*, Control Services, Glenelg, SA.
16	1988	Mattingley, C & Hampton, K (eds) *Survival in Our Own Land, Chapter 28, Nepabunna.* Wakefield Press, Adelaide, SA.
17	1989	Tunbridge, D *Flinders Ranges – A Creation Story*. Habitat Australia.
18	1988	Tunbridge, D Languages Heritage: Flora In Place Names*, Journal of Anthropological Society of SA* Vol. 23(8), pp3-15.
19	21/1/99	Affidavit of named claim group member #1
20	22/1/99	Affidavit of Angelina Stuart
21	22/1/99	Affidavit of named claim group member #2
22	December 1981	Ross, B & Snoek, W "*A Preliminary Survey of Archaeological Sites in the Flinders Ranges National Park, SA*" NPWS, 1981
23	1979, 1983, 1989, 1996	"*Flinders Ranges National Park Management Plan*" NPWS, 1983-96
24	19/10/99	Affidavit of named claim group member #3
	1/9/95	The Genealogy

Attachment F contains a general description of the factual basis for the rights and interests

claimed and describes, in particular, the factual basis on which it is asserted that the three criteria identified at s 190B5(a)–(c) are met. Schedule G and Attachment G provide details of activities currently being carried out within the area claimed. Schedule M provides examples of the traditional physical connection the native title claim group have maintained with the application area, referring to activities carried out in the claim area by the applicants.

The additional information provided by the applicants contains many references that identify the claimants and their ancestors, their presence in and association with the area claimed, and the traditional laws and customs that they continue to observe.

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

Attachment F of the amended application asserts that members of the claim group have, and their predecessors had, an association with the area the subject of the claim from a time prior to the assertion of British sovereignty in relation to the area.

The applicants assert in Schedule G and Attachment G that members of the claim group use and enjoy the area including living, erecting structures, hunting, gathering, maintaining and protecting the natural environment, taking care of significant sites, conducting meetings, ceremonies, rituals and other cultural activities. They state that these uses derive from the laws and customs of their predecessors. The truth of these assertions is deposed to by the applicants in the affidavits filed with the application.

In further support of these assertions the applicants have provided a number of documents listed as folios 6-23 above. Of particular note are affidavits of applicant Angelina Stuart deposed on 22 January 1999 and the affidavit of a named claim group member at folio 24 dated 19 October 1999.

Ms Angelina Stuart's affidavit sets out facts relating to her association with the area, including that she was born at a station adjoining the area of the application and continues to take her children and others to these areas to collect bush foods and other resources. Ms Stuart also describes her role in the protection of sites and transmission of oral stories relating to sites at a number of areas in the Flinders Ranges including within the Flinders Ranges National Park.

The affidavit of a named claim group member at folio 24 asserts that he and his father worked on Oraparinna Station, now part of the Flinders Ranges National Park (FRNP), and that he still camps, hunts, collects food and attends gatherings and meetings in the FRNP.

All four applicants are named in the *Genealogy*, identifying them as members of the claim group.

The Genealogy also charts the relationships of the applicants and other members of the claim group to their predecessors. This material is supported by photographs, reprinted in the Genealogy, from collections held in the State Library of SA showing members of the claim group and their predecessors living and conducting a variety of activities within the claim area dating to the time of early European settlement.

From the details in the *Genealogy* (pp. 2,4,10) Angelina Stuart (nee McKenzie) is able to show a genealogical link to her apical ancestor who is further mentioned in recollections of

an early European settler, W. Rodgers (as reprinted in folio 10 pp. 130-133) as having an association with the area from the time of the first European exploration by Edward John Eyre in 1840.

In the letter of 25 January 1999 the applicants point out that a great amount of the material presented in support of the application is in the public domain. The applicants assert that this includes documents published by the State Government which acknowledge and accept the traditional and continuing exercise of rights and interests by Adnyamathanha People in the area of the application.

Of note is the publication by Peggy Brock, Yura and Udnya, *A History of the Adnyamathanha of the North Flinders Ranges*, published by Wakefield Press in association with the Aboriginal Heritage Branch of the State Government. Extracts from this book were supplied by the applicants as folio 9, however a complete copy is in the Tribunal's possession and has been sighted. The book outlines the Adnyamathanha history from 1840 to the operation of the Nepabunna Mission from 1931 to 1973, and provides brief biographical sketches and photographs of Adnyamathanha ancestors, also listed in the *Genealogy*, that detail association of those people with the claim area.

The publication *Flinders Ranges National Park Management Plan* 1983 (folio 23) states at page 10 *"The Flinders Ranges national Park was occupied by three Aboriginal tribal groups; the Kuyani, Wailpi and Pangkala. Together with the remnants of the Pilatapa and Jadliaura tribes, the descendants of all these tribal groups still exist as a viable cultural unit collectively referred to as the Adnjamathanha tribe."*

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

Attachment F of the amended application asserts that the native title rights and interests are possessed under a body of traditional laws acknowledged and traditional customs observed by the native title claim group and their predecessors.

The activities of the native title claim group described in Schedule G and Attachment G provide a factual basis in support of the assertions made by the applicants in Attachment F. The applicants state at Schedule G that the claim group members protect and preserve the Adnyamathanha culture and heritage through conducting meetings and gatherings, educating their children and others in Adnyamathanha culture, caring for sites and burials in the area. Attachment G asserts that members of the claim group also conduct and participate in cultural activities, ceremonies and rituals within the application area. The truth of these facts is deposed to by the applicants in the affidavits filed with the application.

The additional affidavits of authorised applicant Angelina Stuart (folio 20) and claim group members at folio 21, folio 24 and folio 19, further support these assertions. They describe their knowledge of significant sites in the claim area, how they care for these sites and pass on their knowledge to younger generations.

A named claim group member's affidavit at folio 19 sets out facts in relation to his role in aspects of traditional law relating to access, use and control of the area over the last twenty

years. He relates how these rights and interests are acknowledged and accepted by other Aboriginal people, including people from the Maralinga Lands and the Pitjantjatjara Lands, who have asked permission to enter Adnyamathanha lands and take resources for food. The named claim group member discusses his role in granting this permission and in preparation of food in a traditional manner and outlines his role in teaching children and others of the use and collection of resources and of the significance of rock carving and special sites.

In her affidavit Angelina Stuart describes her knowledge of significant sites and the stories associated with them, traditional food and preparation methods, and making traditional shelters.

A named claim group member at Folio 24 describes how he learnt the location of important cultural and spiritual sites and their significance from his Elders and that he continues to work in the FRNP to protect and preserve sites.

In addition, the applicants have presented material from the public domain in support of the application. As noted previously, the applicants assert this includes documents published by agencies of the State Government which acknowledge and accept the traditional and continuing exercise of rights and interests by Adnyamathanha People in the area of the application (folios 6-18 above). The delegate is not confined to the information in the application and may have regard to such material*: Martin v Native Title Registrar [2001] FCA 16*

Of particular note is a pamphlet entitled *Interpreting Rock Art of the Flinders Ranges*, published by the National Parks and Wildlife Service of South Australia and compiled by a named claim group member (folio 11). The pamphlet acknowledges that the symbols found in paintings relate to rituals and ceremonies of the Adnyamathanha people and were renewed during ceremonies held in the 1940's. It also notes that Adnyamathanha people involved in those ceremonies learned the meaning of those paintings and have supplied information about them to the National Parks and Wildlife authorities.

Also of note is folio 10, an extract from *The Adnyamathanha People: Aboriginal People of the Flinders Ranges; An Aboriginal studies course for secondary students*, published by the Education Department of SA. At pp. 68-70, this publication quotes a number of Adnyamathanha identified in the Genealogy discussing the origin of and relationship of Adnyamathanha traditional law, customs and dreaming as applied by their ancestors and themselves. The extract provided covers traditional Adnyamathanha lore relating to food taboos, marriage rules, law enforcement and family responsibilities.

When considered as a whole, the above affidavits and other supporting material provide sufficient factual basis to support the assertions that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group to support the assertions in Schedule G and Attachments F and G.

190B(5)(c) - *that the native title claim group has continued to hold the native title in accordance with those traditional laws and customs*

Attachment F of the application asserts that the members of the claim group and their predecessors have continued to hold native title in accordance with those traditional laws and customs and provide details of the basis for their transmission, for example through descent from ancestors, conception in the area, birth in the area and knowledge of and participation in traditional ceremonies and rituals associated with the area.

A named claim group member at folio 24 describes how he learnt the location of important cultural and spiritual sites and their significance from his Elders and that he continues to work in the FRNP to protect and preserve sites. He states that he has been a member of the Flinders Ranges Aboriginal Heritage Consultative Committee since 1986 and that the government continues to consult the committee about significant sites and other matters in the FRNP area.

Ms Angelina Stuart's affidavit sets out facts relating to her association with the area including her role in protecting sites and passing on oral stories relating to sites at a number of areas in the Flinders Ranges. Ms Stuart states that she is aware of many sites within the area that are "very important" to the *Adnyamathanha* and that she regularly checks these sites for damage and liaises with the State Government to ensure their protection.

Conclusion

I am satisfied that the information included in the application, the additional material and the affidavits of the members of the native title claim group is sufficient to support the assertion that the claimed native title rights and interests exist, and also supports the following assertions:

- that the native title claim group have, and the predecessors of those persons had, an association with the area;
- that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests;
- that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

Result: **Requirements met**

Native title rights and interests claimed established prima facie: S190B(6)

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

Reasons relating to this condition

Under s.190B(6) I must consider that, *prima facie*, at least some of the native rights and interests claimed, as defined at s.223 of the Act, can be established. The Registrar takes the view that this requires only one right or interest to be registered.

The term '*prima facie*' was considered in *North Ganalanja Aboriginal Corporation v Qld* (1996) 185 CLR 595. In that case, the majority of the court (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ) noted:

> '*The phrase can have various shades of meaning in particular statutory contexts but the ordinary meaning of the phrase "prima facie" is: "At first sight; on the face of it; as it appears at first sight without investigation." [citing Oxford English Dictionary (2nd ed) 1989].*'

And at 35:

> *However, the notion of a good prima facie claim which, in effect, is the concern of s.63(1)(b) and, if it is still in issue, of s. 63(3)(a) of the Act, is satisfied if the claimant can point to material which, if accepted, will result in the claim's success.*

This test was explicitly considered and approved in *Northern Territory v Doepel* 2003 FCA 1384 at paras 134-5 :

> *'134. Although North Ganalanja Aboriginal Corporation v The State of Queensland (1996) 185 CLR 595 (Waanyi) was decided under the registration regime applicable before the 1998 amendments to the NT Act, there is no reason to consider the ordinary usage of `prima facie' there adopted is no longer appropriate: see the joint judgment of Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ at 615 - 616. Their Honours' remarks at 622 - 623 indicate the clearly different legislative context in which that case was decided*
>
> *135. ……see e.g. the discussion by McHugh J in Waanyi at 638 - 641. To adopt his Honour's words, if on its face a claim is arguable, whether involving disputed questions of fact or disputed questions of law, it should be accepted on a prima facie basis.'*

I have adopted the ordinary meaning referred to by their Honours and the expressions of it in the concepts of 'material which, if accepted, will result in the claims success' and 'a claim which is arguable, whether involving disputed questions of fact or disputed questions of law should be accepted on a prima facie basis' .in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

A list of 30 rights and interests are asserted at Schedule E. I have outlined the qualifications to these rights and interests in my reasons for decision in relation to s.190B(4) above.

Identifiable Rights and Interests

In considering whether the rights claimed by the applicants at Attachment E can be established *prima facie*, I have had regard to the same material outlined in my reasons for decision under s.190B(5) above.

The following rights are capable of being recognised, subject to the exclusion clauses and acknowledgements outlined in my reasons for decision under s.190B(4) above.

(1) the right to occupy the area
(5) the right of access to the area
(6) the right to be present on or within the area
(7) the right to live on or within the area
(8) the right to erect shelters on or within the area
(9) the right to camp on or within the area;
(10) the right to move about the area;

The applicants provide examples of their occupancy of the area claimed in accordance with traditional laws and customs at Schedule G and Attachment G and Schedule M.

This is supported by the affidavits of the members of the native title claim group in which they speak of being born in the claim area or close proximity, visiting the claim area, and erecting shelters and camping in the area.

Affidavit at folio 24, paras 4, 8, 10, 11

Affidavit at folio 19, paras 1, 4, 5 -8

Affidavit of Angelina Stuart paras 1-7

Affidavit at folio 21, paras 1, 2, 4

Prima facie these rights are not claimed to the exclusion of all others. See statements in Attachments B(2) and E of the application.

I am satisfied that these rights are, *prima facie*, capable of being established over the whole of the claim area.

(2) the right to use the area
(4) the right to enjoy the area
(12) the right to hunt in the area
(13) the right to gather, use and/or enjoy resources from within the area;
(14) the right to take fauna;
(15) the right to take flora (including timber)
(16) the right to take soil;
(17) the right to take sand, stone, clay, shale and gravel[1] for personal use;
(18) the right to take ochre;
(19) the right to take water from the natural water sources within the area;

The applicants provide examples of their enjoyment of the area claimed in accordance with traditional laws and customs at Schedule G and Attachment G.

The affidavits at folios 19-21 and folio 24 refer to their right to use and enjoy the resources of the area including to hunt, gather native flora, and utilise other resources. These resources include kangaroo and emu, bush tucker such as quandong, wild banana, wild pear, wild tomato and wattle seeds and wood, tree roots and tree boughs for making artefacts and building shelters.

Affidavit at folio 24, paras 4 - 7

Affidavit at folio19, paras 5 - 7
Affidavit of Angelina Stuart paras 4 - 6
Affidavit at folio 21, para 1

Folio 14, at pp. 62-63, outlines the historic trade between Aboriginal groups focusing on ochre deposits and the "tobacco" plant Pituri (*Duboisia hopwoodii*) in the central Flinders Ranges. The Flinders Ranges National Park Management Plan dated 1983 (folio 23) states that a red ochre deposit was one of the focuses of an extensive trade network that existed in Aboriginal Australia, and that red ochre was traded over well established routes for up to 1,000 kilometres. In exchange for ochre local groups received beanwood shields and baler shell ornaments from Queensland, light spear shafts from Queensland and worked kirras from the Alice Springs area. The Flinders Ranges were also a source of good quality fine-grained sandstone for use as grinding stones (p. 10).

(4) the right to make decisions about the use and enjoyment of the area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;
(11) the right to control access to the area of Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;
(20) the right to control the use and enjoyment of the claim area and the resources of the claim area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;

However, subject to the satisfaction of s.190B(5), rights of control of access and use as between holders of native title themselves and any other Aboriginal or Torres Strait Islander people who seek access to or use of the area in accordance with traditional laws and customs may be able to be established *prima* facie over areas where a claim for exclusive possession cannot be sustained: see *De Rose at 553:*

'....The majority in Ward in the High Court did say, at [417], that:"... the grants of the respective pastoral leases were inconsistent with the continued existence of the native title right to control access to and make decisions about the land."

But I take that to constitute a statement of the position between the native title claimants on the one hand and the pastoralist on the other. I do not see that it necessarily takes away the residual rights of control of access and use as between the holders of native title themselves and any other Aboriginal people who seek access to or use of the claim area in accordance with the traditional laws and customs.'

and at [917] and [922]. I note that the rights claimed at (4), (11) and (20) in Attachment E of the current application are limited to making decisions about the use and enjoyment of the area, or controlling access to and use and enjoyment of the claim area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders (emphasis added). I am therefore satisfied that these rights may be established over areas where exclusive possession cannot be sustained.

The applicants provide examples of their right to make decisions about the use and enjoyment of the area by Aboriginal people who are governed by the traditional laws and

customs acknowledged and observed by the native title holders of the area claimed in accordance with traditional laws and customs at Schedule G, and Attachments G and F.

The affidavits at folios 19 and 21 refer to the named claim group members rights to make decisions about the use and enjoyment of the area and to control the access and use and enjoyment of the claim area and resources, particularly where this may impact on resources of cultural concern.

The affidavit at folio 19 sets out facts in relation to the named claim group members role in aspects of traditional law relating to control of use and enjoyment of the application area over the last twenty years. He relates how these rights and interests are acknowledged and accepted by other Aboriginal people, including people from the *Maralinga* Lands and the *Pitjantjatjara* Lands, who have asked permission to enter *Adnyamathanha* lands and take resources for food (paras 1 - 6).

The affidavit at folio 21 outlines roles in relating knowledge of sites, in protection of places of significance, in giving permission for access to sites and in transmitting customs and laws related to those sites to *Adnyamathanha* children (paras 5, 6).

The affidavit at folio 24 outlines how the named claim group member attends meetings within the FRNP to discuss issues of cultural concern and heritage.

(22) the right to receive a portion of the said resources taken by other persons who are Aboriginal people governed by the traditional laws and customs acknowledged and observed by the native title holders;

The named claim group member at folio 19 attests that other Aboriginal people have asked his permission to take resources (kangaroo) from the area and that he has given this permission, prepared the food in traditional manner and shared in the consumption of that resource.

In support, the applicants refer to folio 10 where at page 121 a named claim group member is quoted in 1989 describing the taking and cooking of kangaroo and other meat. He states after preparation and cooking, the meat was shared out in accordance with food taboo rules. 'It's shared when its cooked a certain time, it all depends on the man, or woman, or old people…'

(23) the right to engage in cultural activities within the area;
(24) the right to conduct and participate in ceremonies within the area;
(25) the right to hold and/or participate in meetings within the area;
(26) the right to teach upon the area as to the significant attributes of locations, sites and objects within the area;

The affidavits at folios 19, 20 and 21 refer to their rights to teach and disseminate cultural knowledge associated with significant sites or areas through meetings, the telling of stories and reinforcement of customary behaviour to *Adnyamathanha* people and others.

Affidavit at folio 24, paras 4, 6-11

Affidavit at folio 19, para 8

Affidavit of Angelina Stuart paras 2, 7

Affidavit at 21, para 4

In support of these rights, the applicants refer to folio 17, a copy of an article by linguist Dorothy Tunbridge, in *Habitat Australia* of February 1989, that details her experiences visiting sites of significance with an Adnyamathanha elder, now deceased and relates stories passed on to younger Adnyamathanha at Mount Chambers and other sites around the claim area.

(27) the right to carry out and maintain burials of deceased native title holders and of their ancestors within the area;

At folio 22, the named claim group member attest that she visits grave sites of Adnyamathanha people in the area and passes on customs and stories relating to these sites to Adnyamathanha children. The named claim group member also attests that she has successfully persuaded the local Progress Association to move a town rubbish dump in order to ensure grave sites were not disturbed (paras 2 – 4).

In support, folio 14, outlines Adnyamathanha involvement in inspection of development areas to prevent disturbance of burial sites (p64).

(28) the right to maintain, conserve , and/or protect from desecration, damage, disturbance, or interference, significant locations, sites and objects within the area;

Folio11, a pamphlet prepared by DENR and compiled by a named claim group member discusses interpreting and protecting the rock art of the Flinders Ranges. Folio 16 pictures a number of identified Adnyamathanha men in their employment as National Park Rangers in 1983, and discusses, amongst other things, their roles in site management and protection. Folio23, discusses Adnyamathanha involvement in the management of the FRNP and particularly involvement in the inspection of development areas to prevent disturbance of sites.

In their affidavits the members of the native title claim group describe how they protect significant sites from damage.

Affidavit at folio 24, paras 8, 11

Affidavit at folio 19, para 8

Affidavit of Angelina Stuart para 3

Affidavit of at folio 21, paras 3, 5, 6.

(29) the right to maintain, conserve and/or protect significant ceremonies, artworks, song cycles, narratives, beliefs or practices by preventing (by all reasonable lawful means) any activity occurring on the area which may desecrate, damage, disturb or interfere with any such ceremony, artwork, song cycle, narrative, belief or practice;

(30) the right to prevent (by all reasonable lawful means) any use or activity within the area which under traditional laws and customs is unauthorised or inappropriate in relation to significant locations, sites or objects within the area or ceremonies, artworks, song cycles, narratives, beliefs or practices carried out within the area.

I find that these rights can only be established, *prima facie*, in relation those parts the subject of non-exclusive pastoral leases. However, from an examination of the tenure it would appear that there are no areas within the application area where these native title rights can be established.

In the context of areas subject to pastoral leases the High Court majority approach in *Ward* was applied by Nicholson J in *Daniel* who found:

> *'In these proceedings there have not been any findings of native title rights involving exclusivity or control by the holders of the right. The findings in respect of the claim by the first applicants for a right in terms of (n) 'Protect and care for sites and objects' does not in its terms involve control. The case for the first respondents nevertheless submits that a right to maintain places of importance must include the right to exclude others from the place being protected. No right to (o) and (q) has been found; rather they are found to be duties attaching to right (n). To the extent the aspect of exclusive control is implied in the right to protect or the duties to maintain and protect, it would be extinguished as inconsistent with the rights of the lessee under the pastoral lease.' [underline emphasis added]*

Sundberg J in *Neowarra v WA* [2003] FCA 1402, with regard to 'rights of access to, right to control the access of others to, rights to make decisions in relation to, and right to paint, freshen and repaint' certain painted images on rock surfaces within the claim area covered by a pastoral lease, stated:

> *'This is in part consistent with the rights of a pastoral lessee. In my view claimants with a traditional right to freshen or repaint a particular painting site may have access to pastoral land in order to exercise that right. Neither the access nor the freshening or repainting is inconsistent with the pastoral lease. However, a right to control the access of others to the site is inconsistent, since it amounts to a right of exclusive possession of the site: Ward at [52]. The same will apply to the right to make decisions about the images if it is asserted as an exclusive right. If it is a non-exclusive right, its content is not sufficiently clear to be recognised – at [491].*

However, in *Alyawarr* Mansfield J recognised a non-exclusive right of native title holders to control use and access on a pastoral lease in respect of persons other than the pastoral lessee. Citing the Full Court in *Ward*, his Honour stated:

> *'I have reached the view that the native title rights to control access to the claim area and to make decisions about its use are not so inconsistent with rights under the pastoral lease as to lead to their total extinguishment. In my judgement, the right to make such decisions is extinguished only to the extent that it is inconsistent with the rights of a pastoral lessee to make decisions concerning those matters.' – at [274]. See also [270] to [273].*

His Honour referred to persons seeking to enter the land to film a sacred site by way of example as to persons in respect of whom the native title holders might exercise such a residual right to control use and access of others on pastoral lease areas– at [271].

Given this finding by Mansfield J, the question of whether there is a residual right of native title holders (subject to the rights and interests of the pastoralist) to control access and use on pastoral leases is clearly arguable. It is a question to be resolved by a court – not by the Registrar. As I have noted above, where the question is open, I should take a beneficial approach to the material before me. I therefore find that the rights at 6, 14, 24, 25, 27, 34

and para 35 can (subject to the right not purporting to operate contrary to the pastoralist's rights and interests) be *prima facie* established in respect of Area A and those parts of Area B the subject of non-exclusive pastoral leases.

I do not consider that the finding of Mansfield J in *Alyawarr* as to a residual right to control use and access on non-exclusive pastoral leases should, for the purposes of s. 190B(6), be applied generally in respect of other non-exclusive tenures. The majority of the High Court in *Ward*, and subsequent Federal Court decisions, took the same approach in relation to reserves as in relation to non-exclusive pastoral leases when considering the question of extinguishment. However Mansfield J in *Alyawarr* made his finding only in context of consideration of non-exclusive pastoral leases. His Honour did not consider the position regarding reserves, or any other categories of non-exclusive tenures, as such tenures were not claimed in that application.

Therefore I do not accept that there are areas within this application area subject to non-exclusive pastoral leases where these native title rights can be established, *prima facie*.

(21) the right to trade in said resources of the area, upon or within the area:

In *Yarmirr*, Olney J considered the 'right to engage in the trade and exchange of estate resources' of senior *yuwurrumu* members of the Croker Island region. The applicants claimed that they had engaged in trade not only among themselves but with Macassan trepangers, and that this trade was in accordance with traditional law and custom. Oral evidence for this 'right to trade' was adduced in court; the applicants also relied on an anthropological report by Drs Peterson and Devitt. This report indicated that the right 'to engage in the trade and exchange of estate resources' was part of, and flowed from, a more general right of senior *yuwurrumu* members to control the use and access to the subsistence and other resources of the estate.

Ultimately, Olney J found that there was evidence that in the past, the group's ancestors had engaged in a '*form* of trade' [my emphasis] which was constituted by 'an exchange of goods' with Macassan trepangers. However, Olney J felt that the evidence fell 'short of establishing that the applicants' forbears had traded with the Macassans' as such. [para 121].

Olney J further noted that none of the goods traded in intra-Aboriginal exchanges were 'subsistence resources' derived from either the land or the sea" [para. 120]. Nor was there any evidence, in his Honour's opinion, that these activities were in exercise of a native title right in relation to the claimed area. In any event, 'such trade as there may have been' ceased after European contact [para. 122].

At any rate, over and above factual difficulties, Olney J felt that '[t]he so-called "right to trade" was not a right or interest in relation to the waters or land' [para. 120], and was, therefore, not capable of being claimed as a native title right and interest under s. 223 of the Act.

These issues were raised on appeal to the Full Federal Court. In their written submission, the applicants invited the court to reject Olney J's approach. They claimed that the right to trade was indeed a right or interest in relation to the waters or land and that "the very

existence of conflict ...[between the forebears of the claim group and Macassan traders was]...suggestive of perceived infringement of traditional law and custom" [para 3.44 of submission, quoted at para 427 of judgment].

Of this suggestion, their Honours had this to say: *"It may well be right, as the argument runs, and as seems logical, to view the right to trade as 'an integral part,' or integral aspect of a right to exclusive possession."* The Full Court noted that Olney J had not considered the right to trade as a right in relation to land and water within the meaning of s.223 of the *NTA*, but made no finding on the issue. It was not raised before the High Court. Based on these comments, it appears that the Full Court accepted that this right was a native title right or interest in relation to land and water, and that it could be established *prima facie*.

The question then is whether this is a right which can be established *prima facie* in areas over which a claim for exclusive possession is not sustained. Is the right to dispose of natural resources taken from the claim area and manufactured items derived from the claim area by trade, exchange or gift *necessarily* a right which amounts to control of access to or use of the claim area? Once again, there seems to be no clear authority on this point. In light of the comments of the Full Court in *Yarmirr,* it is my view that the right to trade can only be established over areas where a claim to exclusive possession can be sustained.

Conclusion

The rights and interests in (1) – (20) and (22) – (28) are capable of being established on a *prima facie* basis in relation to the area, while the rights at (21), (29) and (30) are not capable of being established in the area.

I direct that the following rights be entered on the Register of Native Title Claims:

(1) the right to occupy the area
(2) the right to use the area
(3) the right to enjoy the area
(4) the right to make decisions about the use and enjoyment of the area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;
(5) the right of access to the area
(6) the right to be present on or within the area
(7) the right to live on or within the area
(8) the right to erect shelters on or within the area
(9) the right to camp on or within the area;
(10) the right to move about the area;
(11) the right to control access to the area of Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;
(12) the right to hunt in the area
(13) the right to gather, use and/or enjoy resources from within the area;
(14) the right to take fauna;
(15) the right to take flora (including timber)
(16) the right to take soil;
(17) the right to take sand, stone, clay, shale and gravel[1] for personal use;
(18) the right to take ochre;
(19) the right to take water from the natural water sources within the area;

(20) the right to control the use and enjoyment of the claim area and the resources of the claim area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;

(22) the right to receive a portion of the said resources taken by other persons who are Aboriginal people governed by the traditional laws and customs acknowledged and observed by the native title holders

(23) the right to engage in cultural activities within the area;

(24) the right to conduct and participate in ceremonies within the area;

(25) the right to hold and/or participate in meetings within the area;

(26) the right to teach upon the area as to the significant attributes of locations, sites and objects within the area

(27) the right to carry out and maintain burials of deceased native title holders and of their ancestors within the area

(28) the right to maintain, conserve, and/or protect from desecration, damage, disturbance, or interference, significant locations, sites and objects within the area

Result: Requirements met

Traditional physical connection: S190B(7)

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

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

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

(i) the Crown in any capacity; or

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

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

Reasons relating to this condition

Under s.190B(7)(a) I must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application.

I have had regard to statements contained in the application including Schedules G and M and the affidavits of the applicants and I am satisfied that the applicants have provided a general description of their traditional physical connection with the area claimed. The applicants depose that the statements are true, and Schedule M, in particular, details the traditional physical connection to the land and waters covered by the application by one or more members of the native title claim group.

The affidavit at folio 24 sets out details of the named claim group member and his father's connection to the area including cultural activities he still pursues within the application area.

I am satisfied that the requirements of this condition are met.

Result: Requirements met

No failure to comply with s61A: S190B(8)

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.

S61A contains four sub-conditions. Because s190B(8) asks the Registrar to test the application against s61A, the decision below considers the application against each of these four sub-conditions.

Reasons relating to this sub-condition

For the reasons that follow I have concluded that there has been compliance with s.61A.

S61A(1)- Native Title Determination

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

S61A(2)- Previous Exclusive Possession Acts

In Attachment B of the application class exclusions are made. For the reasons provided above at s.190B(2) these exclusions are sufficiently clear to provide reasonable certainty about all the tenure excluded. This tenure includes all areas subject to previous exclusive possession acts as defined in s.23B of the NTA, apart from those areas where s.47B operates.

Specifically, the applicants state at Attachment B that subject to any area where ss.47, 47A and 47B apply, the applicants exclude any area to which:

- a 'previous exclusive possession act' as defined in s.23B of the NTA, was done by the Commonwealth or State of SA (and was not an exempted act as defined by s.36F of *Native Title (South Australia) Act 1994* (SA)); or
- native title rights and interests have otherwise been wholly extinguished.

The exclusion clauses at Attachment B meet the requirements of this subsection.

S.61A(3) – Previous Non-Exclusive Possession Acts

S.61A(3) requires that the application does not include a claim for exclusive possession over areas that are or were subject to a valid previous non-exclusive possession act attributable to the Commonwealth or to a State or Territory, and a law of the State or Territory has made provision as mentioned in section 23I in relation to the act.

I am satisfied that the applicants do not claim exclusive possession over such areas, and that the application complies with s.61A(3).

S.61A(4) – s.47, 47A, 47B

The applicants provide no details of any areas to which they are claiming pursuant to ss. 47, 47A and 47B, but at Schedule E state that the application area includes any area to which ss. 47, 47A and 47B apply. This complies with the sub-section.

Result: Requirements met

No claim to ownership of Crown minerals, gas or petroleum: S190B(9)(a)

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

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

Reasons relating to this sub-condition

At Schedule Q the applicants state that no claim is made to any native title rights and interests consisting of or including ownership of minerals, petroleum or gas wholly owned by the Crown under valid laws of the Commonwealth or State.

While the applicants claim various rights in relation to resources, they clarify at para (d) of Attachment E of the application that the 'resources' do not include;

- minerals (as defined in the *Mining Act 1971* (SA) other than extractive minerals (as therein defined) recovered for his or her own personal use by a person who holds native title in the land; or
- petroleum (as defined in the *Petroleum Act 1940* (SA)).

Result: Requirements met

No exclusive claim to offshore places: S190B(9)(b)

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

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

Reasons relating to this sub-condition

The applicants state 'Not applicable' at Schedule P of the application. It is clear from the description of the area claimed at Schedule B that it does not include any offshore places.

Result: Requirements met

Native title not otherwise extinguished: S190B(9)(c)

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

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

Reasons relating to this sub-condition

At Attachment B the applicants state that subject to any area where ss.47, 47A and 47B apply, the applicants exclude any area to which:

- a 'previous exclusive possession act' as defined in s.23B of the NTA, was done by the Commonwealth or State of SA (and was not an exempted act as defined by s.36F of *Native Title (South Australia) Act 1994* (SA)); or
- native title rights and interests have otherwise been wholly extinguished.

In light of my reasons in relation to s.190B(6) above and the above statements, I am satisfied that there is nothing in either the application or the accompanying documents that discloses that the native title rights and interests claimed have otherwise been extinguished. Nor am I otherwise aware that this is the case.

The application meets the requirements of s.190B(9)(c).

Result: Requirements met

[End of document]

ATTACHMENT A

THE FOLLOWING IS TO BE ENTERED AS CONTENTS OF THE REGISTER OF NATIVE TITLE CLAIMS PURSUANT TO S186

S186 (1)

(a) whether the application was filed in the Federal Court or lodged with a recognised State/Territory body

The application was filed in the Federal Court.

(b) if the application was lodged with a recognised State/Territory body – the name of that body

N/A

(c) the date on which the application was filed or lodged

19 January 1995

(c.a) the date on which the claim is entered on the Register

9 July 2004

(d) the name and address for service of the applicant/s

Applicant/s:

Mr Mark McKenzie, Mr Michael Anderson, Mrs Angelina Stuart, Mr Roger Johnson

Address for service:

Johnston Withers, Barristers and Solicitors
17 Sturt St
Adelaide SA 5000

(e) the area of land or waters covered by the claim

as per CMS {note typographical error in Schedule B, Description, areas within the application area should read ..Out of Hundreds (Parachilna) : Sections 106, 333, 473, 480, 988, **989** and 1137 and Block 670.

(f) a description of the persons who it is claimed hold the native title

All those Adnyamathanha people presently alive who are:

- named in the Adnyamathanha Genealogy (Attachment A1); but
- excepting those persons named in Annexure A2, who are spouses of named members in the genealogy at A1, but who are themselves not members of the claim group, but including
- the descendants, whether biological or adopted, of those so named (including the case of those adopted pursuant to traditional laws and customs).

(g) a description of the native title rights and interests in the claim that the Registrar in applying the subsection 190B(6); considered, prima facie, could be established.

(1) the right to occupy the area
(2) the right to use the area
(3) the right to enjoy the area
(4) the right to make decisions about the use and enjoyment of the area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;
(5) the right of access to the area
(6) the right to be present on or within the area
(7) the right to live on or within the area
(8) the right to erect shelters on or within the area
(9) the right to camp on or within the area;
(10) the right to move about the area;
(11) the right to control access to the area of Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;
(12) the right to hunt in the area
(13) the right to gather, use and/or enjoy resources from within the area;
(14) the right to take fauna;
(15) the right to take flora (including timber)
(16) the right to take soil;
(17) the right to take sand, stone, clay, shale and gravel[1] for personal use;
(18) the right to take ochre;
(19) the right to take water from the natural water sources within the area;
(20) the right to control the use and enjoyment of the claim area and the resources of the claim area by Aboriginal people who are governed by the traditional laws and customs acknowledged and observed by the native title holders;
(22) the right to receive a portion of the said resources taken by other persons who are Aboriginal people governed by the traditional laws and customs acknowledged and observed by the native title holders
(23) the right to engage in cultural activities within the area;
(24) the right to conduct and participate in ceremonies within the area;
(25) the right to hold and/or participate in meetings within the area;
(26) the right to teach upon the area as to the significant attributes of locations, sites and objects within the area
(27) the right to carry out and maintain burials of deceased native title holders and of their ancestors within the area
(28) the right to maintain, conserve, and/or protect from desecration, damage, disturbance, or interference, significant locations, sites and objects within the area

S186 (2)

The Registrar may include in the Register such other details about the claim as the Registrar thinks appropriate.

Map at Attachment C

Copies of Annexures A1 and A2 identified and signed on the cover by the Delegate.