Case Note:

Adnyamathanha No 1 Native Title Claim Group v The State of South Australia; *Adnyamathanha No 1 Native Title Claim Group v The State of South Australia (No 2)*

> My people have always known that this land always was and always will be Adnyamathanha land, but to have this recognised by all of the other stakeholders is a huge achievement. All of our hard work has now come to fruition.[1]

On 30 March 2009 the native title rights and interests of the Adnymathanha people were recognised. The Federal Court registered three consent determinations over areas of land in South Australia. The claim is the largest to be determined in South Australia.

The Consent Determinations

The first case, *Adnyamathanha No 1 Native Title Claim Group v The State of South Australia*[2] concerned an application for separate determinations of native title under section 61(1) *Native Title Act 1993* (Cth). It was proposed that the first claim, relating to a substantial area in South Australia, be subject to two consent determinations, one over a large part of the claim and another over the smaller Angepena area covered by one of the pastoral leases in the claim.

The reasoning behind the decision to have two separate consent determinations was that it would result in a mutually satisfying outcome in a timely and efficient manner, given the complex and varied nature of the proposed land uses in Angepena . Further, the work and negotiations conducted in relation to Angepena were specific to the area. Thus, the court ordered that the hearing of the proposed consent determinations be confirmed for a later date, with a separate consent determination to be entered in relation to Angepena Station. These claims form the basis of the second case, *Adnyamathanha No 1 Native Title Claim Group v The State of South Australia (No 2)*[3]

In the second case, Justice Mansfield of the Federal Court made three determinations of native title in response to the applications for consent determinations. As mentioned above, the applications were made after reaching an agreement that native title exists in some parts of the claim areas and has been extinguished in others. The parties also agreed on the native and extent of the native title rights and interests (these are outlined below).

The applications were made under sections 87 and 87A of the NTA. Section 87 sets out the Federal Court's power to make orders sought by the consent of the parties. Section 87A sets out the power to make orders sought by consent of the parties to make a determination for part of an area. Justice Mansfield found that the required period under both provisions had elapsed, and other requirements relating to filing of documents had been met.

As the orders sought concerned a determination of native title, they had to comply with section 94A NTA which specifies that the proposed orders must contain the details mentioned in section 225. Section 225 requires, amongst other things, specification of the details of the nature and extent of native title rights and interests in relation to the determination area. 'Native title rights and interests' are defined in section 223(1) as:

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

Justice Mansfield held that the material relied upon by the applicants, and the terms of the proposed consent determinations, adequately addressed the requirements of sections 223(1) and 225.

Specifically, the Adnyamathanha people and their society were clearly identified (this was despite the term

[1] Vince Coulthard, Chairperson of the Adnyamathanha Traditional Land Association, *Aboriginal Way*, Issue No.37, March 2009, p1.
[2] [2009] FCA 358.
[3] [2009] FCA 359.

'Adnyamathanha' referring to a large group with separately identifiable language groups). Also, there had been,

> substantially uninterrupted observance of traditional laws and customs since sovereignty, albeit not necessarily homogenous in the level of its observation, and notwithstanding varying levels of knowledge and enforcement amongst the Adnyamathanha people.[4]

Moreover, Justice Mansfield described the continued use of the Adnyamathanha language, and the ongoing knowledge of muda or Dreaming traditions as 'strong identifier[s] of ongoing Adnyamathanha custom and identity'.[5]

Although a late objection was made by a pastoralist who did not consent to the determination, Justice Mansfield decided to proceed with the hearing of the application for consent determinations for two reasons. First, there a range of prescribed notification procedures in the NTA which the pastoralist did not seek to utilise at any time. Second, the pastoralist was aware of the Adnyamathanha claim and could have expressed any concerns at an earlier time.

Native Title Rights and Interests

The native title rights and interests, subject to later paragraphs, are rights to use, stay on and enjoy the land and waters of on the determination areas.

These rights and interests include: the right to access and move about the area; the right to live, to camp and to erect shelters; the right to hunt and fish; the right to gather and use the natural resources such as food, plants, timber, resin, ochre and soil; the right to cook and to light fires for cooking and camping purposes, the right to use the natural water resources; the right to distribute, trade or exchange the natural resources; the right to conduct ceremonies and hold meetings; the right to engage in and participate in cultural activities; the right to carry out and maintain burials of deceased native title holders and of ancestors; the right to teach the physical and spiritual attributes of locations and sites; the right to visit, maintain and preserve sites and places of cultural or spiritual significance; the right to speak for and make decisions in relation to the use and enjoyment of the area by Aboriginal people who recognise themselves to be governed by the traditional laws and customs acknowledged by the Native Title Holders; and the right to be accompanied on to determination the area by other people.[6]

Overall

Overall, as noted by the CEO of South Australian Native Title Services (SANTS) Parry Agius:

> There is a lot to celebrate, but we should also recognise that it took ten years of hard work and that demonstrates, that without doubt, there is room for improving the process to make native title work better and more efficiently … There is also clearly a need to challenge negative attitudes to native title that unfortunately persist and we must continue to work at that.[7]

Aboriginal and Torres Strait Islander Social Justice Commissioner *Native Title Report 2008*: Summary

By Cynthia Ganesharajah, Research Officer NTRU

This article is extracted from the summary contained within the *Native Title Report 2008*.

Each year the Aboriginal and Torres Strait Islander Social Justice Commissioner delivers a *Native Title Report* to the Federal Parliament. In these reports the Commissioner, 'gives a human rights perspective on native title issues

[4] *Adnyamathanha No 1 Native Title Claim Group v The State of South Australia (No 2)* [2009] FCA 359, Mansfield J, [28].
[5] *Adnyamathanha No 1 Native Title Claim Group v The State of South Australia (No 2)* [2009] FCA 359, Mansfield J, [29].
[6] For the entire list see Annexure A, paragraph 7.
[7] Parry Agius, SANTS Chief Executive, *Aboriginal Way*, Issue No.37, March 2009, p1.