National Native Title Tribunal

Registration test decision

Application name	Pilki People
Name of applicant	Victor Willis, [Name withheld for cultural reasons], Daniel (Stevie) Sinclair and Betty Kennedy
NNTT file no.	WC2002/003
Federal Court of Australia file no.	WAD6002/2002
Date application made	12 August 2002
Date application last amended	17 September 2013

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

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

Date of decision: 10 January 2014

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Radhika Prasad

Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cwlth) under an instrument of delegation dated 30 July 2013 and made pursuant to s. 99 of the Act.

Reasons for decision

Introduction

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

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

Application overview

[3] The Pilki People application is currently entered on the Register of Native Title Claims having been accepted for registration by a delegate of the Registrar on 18 April 2005. The application was amended prior to the claim being accepted for registration.

[4] On 17 September 2013, the further amended application was filed with the Federal Court of Australia (the Court). The Registrar of the Court gave a copy of this application to the Registrar on 19 September 2013 pursuant to s. 64(4) of the Act. This has triggered the Registrar's duty to consider the claim made in the application under s. 190A of the Act.

Requirements of s. 190A

[5] My consideration of the application is governed by s. 190A of the Act. Section 190A(6) requires the Registrar to consider whether a claim for native title satisfies the conditions in ss. 190B and 190C. This is known as the registration test. The test is triggered when a new claim is referred to the Registrar under s. 63 or in some instances when a claim in an amended application is referred under s. 64(4). The test will not be triggered when an amended application satisfies the conditions of ss. 190A(1A) or (6A). I must therefore consider if the circumstances described in ss. 190A(1A) or (6A) apply to the amended application, such that I need not consider it again for registration. For the following reasons, I am satisfied that neither subsection 190A(1A) nor subsection 190A(6A) apply to this claim:

- subsection 190A(1A) does not apply as the application was not amended because an order was made under s. 87A by the Court; and
- subsection 190A(6A) does not apply because the effect of the amendments to the native title determination application, which includes a change to the composition of the native title claim group, falls outside the exceptions to undertaking a full registration test set out in subparagraphs 190A(6A)(d)(i) to (v).

[6] I must therefore apply the full registration test to this amended application. In accordance with s. 190A(6), I must accept the claim for registration if it satisfies all of the conditions in ss. 190B and 190C of the Act. If those conditions are not satisfied then, pursuant to s. 190A(6B), I must not accept the claim for registration.

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

[8] As discussed in my reasons below, I consider that the claim in the application satisfies all of the conditions in ss. 190B and 190C and therefore, pursuant to s. 190A(6), it must be accepted for registration. Attachment A contains the information that must be included on the Register of Native Title Claims (the Register).

Background

[9] A notice has been issued in relation to the grant of an exploration licence (E69/3185) in accordance with s. 29 of the Act with a notification date of 11 September 2013. The amended application was filed within the three (3) month timeframe over the area affected by the future act notice and this has required me to use my best endeavours to finish considering the claim by the end of four (4) months after the notification day, that is 10 January 2014 — see s. 190A(2).

[10] I note that a further notice was issued in relation to the grant of an exploration licence (E69/3195) in accordance with s. 29 of the Act with a notification date of 25 September 2013 and four (4) month closing date of 25 January 2014.

Information considered when making the decision

[11] Subsection 190A(3) directs me to have regard to certain information when testing an application for registration; there is certain information that I *must* have regard to, but I *may* have regard to other information as I consider appropriate.

[12] I am also guided by the case law (arising from judgments in the courts) relevant to the application of the registration test. Among issues covered by such case law is the issue that some conditions of the test do not allow me to consider anything other than what is contained in the application while other conditions allow me to consider wider material.

[13] I understand s. 190A(3) to stipulate that the further amended application and information in any other document provided by the applicant is the primary source of information for the decision I make. However, I am of the view that it is appropriate that I consider information found within or accompanying the original application filed on 12 August 2002 and the amended application filed on 1 April 2005. Accordingly, I have taken into account the following material in coming to my decision:

- The information contained in the original application and accompanying documents filed 12 August 2002.
- The information contained in the amended application and accompanying documents filed 1 April 2005.
- The information contained in the further amended application and accompanying documents filed 17 September 2013, including the further amended statement of claim and orders and determination sought which were annexed to the affidavit of the principal

lawyer from Central Desert Native Title Services Ltd (Central Desert) affirmed on 28 August 2013.

- The Geospatial Assessment and Overlap Analysis (GeoTrack: 2013/1852) prepared by the Tribunal's Geospatial Services on 25 September 2013 (geospatial assessment).
- The additional information provided by the applicant on 18 October 2013.
- The results of my own searches using the Tribunal's mapping database and registers.

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

[15] Also, I have *not* considered any information that may have been provided to the Tribunal in the course of mediation in relation to this or any other claimant application.

Procedural fairness steps

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

- On 24 September 2013, the case manager for this matter sent a letter to the State of Western Australia (the State) enclosing a copy of the Extract from the Schedule of Native Title Applications which shows details of the application. That letter informed the State that any submission in relation to the registration of this claim should be provided by 18 October and that the delegate anticipates making the registration test decision by 10 January 2014. The State has not provided any submission.
- The case manager, also on 24 September 2013, wrote to inform the applicant that the delegate proposed to make the registration test decision by 10 January 2014 and that any additional information should be provided by 18 October 2013.
- On 18 October 2013, the applicant provided a number of documents in support of the application of the registration test. In an email dated 22 October 2013, the applicant confirmed that only some of those documents are of a confidential nature.
- On 28 October 2013, after receipt of a confidentiality undertaking by the State, the additional material was provided to the State. The State was informed that any response in relation to the additional material should be provided by 8 November 2013. The State has not provided any response.

Procedural and other conditions: s. 190C

Subsection 190C(2)
Information etc. required by ss. 61 and 62

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

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

[18] I note that I am considering this claim against the requirements of s. 62 as it stood *prior* to the commencement of the *Native Title Amendment (Technical Amendments) Act 2007* on 1 September 2007. This legislation made some minor technical amendments to s. 62 which only apply to claims made from the date of commencement of the Act on 1 September 2007 onwards, and the claim before me is not such a claim.

[19] In coming to this conclusion, I understand that the condition in s. 190C(2) is procedural only and simply requires me to be satisfied that the application contains the information and details, and is accompanied by the documents, prescribed by ss. 61 and 62. This condition does not require me to undertake any merit or qualitative assessment of the material for the purposes of s. 190C(2). As explained by Mansfield J in *Northern Territory v Doepel* [2003] FCA 1384 (*Doepel*):

> 37 [Section 190C(2)] does not involve the Registrar going beyond the application, and in particular does not require the Registrar to undertake some form of merit assessment of the material …
>
> 39 [F]or the purposes of the requirements of s 190C(2), the Registrar may not go beyond the information in the application itself — see also [16], [35] and [36].

[20] Accordingly, the application must contain the prescribed details and other information in order to satisfy the requirements of s. 190C(2).

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

[22] I now turn to each of the particular parts of ss. 61 and 62:

Native title claim group: s. 61(1)

[23] Schedule 2 of the orders and determination sought provides a description of the native title claim group, an extract of which can be seen in my reasons below at s. 190B(3). The application indicates that the persons comprising the applicant are included in the native title claim group — see Part A of the Form 1.

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

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

[25] Part B of the application contains the name and address for service of the applicant.

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

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

[27] I consider that Schedule 2 of the orders and determination sought contains a description of the persons in the native title claim group that appears to meet the requirements of the Act.

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

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

[29] The original application was accompanied by affidavits from each of the persons comprising the applicant. Those affidavits contain all of the statements set out in s. 62(1)(a)(i) to (v), including stating the basis on which the applicant is authorised as mentioned in subsection (iv). I note that the applicant has not been replaced since the original filing of the application in 2002.

[30] In *Drury v Western Australia* [2000] FCA 132 (*Drury*), French J dealt with an amendment of geographical contraction of a claim area and held that not all amendments of applications required the filing of new s. 62 affidavits with an amended application. His Honour referred to s. 64(5), as then provided for under the Act:

> Section 64 makes specific provision, in subsection (5) for an affidavit to be filed where there is a new applicant replacing an existing applicant. The new affidavit is limited to the issue of authorisation. The new applicant is not required to swear to the other matters set out in paragraph (a) of s 62(1). That specific requirement is understandable given the importance of authorisation of applicants by the native title claim group as underpinning the legitimacy of the application — *Strickland v Native Title Registrar* [1999] FCA 1530; (1999) 168 ALR 242 at 259-260 [(*Strickland*)]. The express provision in s 64(5) and its limited terms and application militate powerfully against the State's contention of a superadded obligation in every case of amendment to file an affidavit by the applicants verifying all of the matters set out in s 62(1)(a). There is no express requirement of the kind to which the State contends and in the face of the provisions of s 64 and the real practical difficulty that it would bring to the process of amendment, there is no proper basis for implying it — at [10].

[31] Amendments to the Act in 2007 removed the requirement to file fresh affidavits with an application amended to replace an applicant; rather, an applicant can only be replaced pursuant to s. 66B. Therefore, in accordance with *Drury*, there appears to be no legal requirement to file fresh s. 62(1)(a) affidavits with each amendment of an application.

[32] As the applicant has not been replaced, I am of the view that I am permitted to consider the original s. 62(1)(a) affidavits filed on 12 August 2002 for the purposes of this provision — see *Drury* at [10].

[33] The application **is** accompanied by the affidavits required by s. 62(1)(a).

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

[34] The application **contains** all details and other information required by s. 62(1)(b) because it contains the details specified in ss. 62(2)(a) to (h), as identified in the reasons below.

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

[35] Attachment B contains information that allows for the identification of the boundaries of the area covered by the application and the areas within those boundaries that are not covered by the application.

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

[36] Attachment C contains a map showing the boundaries of the application area.

Searches: s. 62(2)(c)

[37] Schedule D and Attachment D contain details and results of all searches carried out by or on behalf of the native title claim group.

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

[38] The application provides a description of the native title rights and interests claimed in relation to the application area. The description does not consist only 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 — further amended statement of claim at [5] to [43] and Orders [3] to [6] of the orders and determination sought.

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

[39] The further amended statement of claim, at [5] to [43], contains details and other information, which in my view meets the requirements of a general description of the factual basis for the assertions identified in this section. I note that there may also be other information within the application that is relevant to the factual basis.

Activities: s. 62(2)(f)

[40] Attachment G states that the native title claim group members carry on, and their predecessors carried on, activities such as to fully exercise the group's rights and interests. The further amended statement of claim provides further details in relation to the activities of the native title claim group.

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

[41] Schedule H provides that there are 'no other applications that have been made in relation to the whole or part of the area covered by this application that seek a determination of native title or a determination of compensation in relation to native title'.

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

[42] Attachment I contains details of one notice given under s. 29 that the applicant is aware of as at 20 March 2013.

Conclusion

[43] The application **contains** all details and other information required by ss. 62(2)(a) to (h).

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

> The Registrar/delegate must be satisfied that no person included in the native title claim group for the application (the current application) was a member of the native title claim group for any previous application if:
> (a) the previous application covered the whole or part of the area covered by the current application, and
> (b) the previous application was on the Register of Native Title Claims when the current application was made, and
> (c) the entry was made, or not removed, as a result of the previous application being considered for registration under s. 190A.

[44] In my view, the requirement that the Registrar be satisfied that there are no common claimants arise where there is a previous application which comes within the terms of subsections (a) to (c) — *State of Western Australia v Strickland* [2000] FCA 652 (*Strickland FC*) at [9].

[45] I note that the text of this provision reads in the past tense, however I consider the proper approach would be to interpret s. 190C(3) in the present tense as to do otherwise would be contrary to its purpose. The explanatory memorandum that accompanied the Native Title Amendment Bill 1997 relevantly provides that:

> 29.25 The Registrar must be satisfied that no member of the claim group for the application … *is* a member of the claim group for a registered claim which was made before the claim under consideration, which *is* overlapped by the claim under consideration and which itself has passed the registration test [emphasis added].
>
> …
>
> 35.38 The Bill generally discourages overlapping claims by members of the same native title claim group, and encourages consolidation of such multiple claims into one application.

[46] I understand from the above that s. 190C(3) was enacted to prevent overlapping claims by members of the same native title claim group from being on the Register at the same time. That purpose is achieved by preventing a claim from being registered where it has members in

common with an overlapping claim that is on the Register *when* the registration test is applied. I consider that this approach, rather than a literal approach, more accurately reflects the intention of the legislature.

[47] I also note that in assessing this requirement, I am able to address information which does not form part of the application — *Doepel* at [16].

[48] The geospatial assessment does not identify a previous application that covered the whole or part of the area covered by the current application. The assessment only identifies this application (being the current application).

[49] I have also undertaken a search of the Tribunal's mapping database and am of the view that there is no previous application that covered the whole or part of the area covered by the current application.

[50] I am therefore satisfied that there is no previous application to which ss. 190C(3)(a) to (c) apply. Accordingly, I do not need to consider the requirements of s. 190C(3) further.

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

Subsection 190C(4) Authorisation/certification

> Under s. 190C(4) the Registrar/delegate must be satisfied that either:
> (a) the application has been certified under Part 11 by each representative Aboriginal/Torres Strait Islander body that could certify the application, or
> (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.
>
> Note: The word ***authorise*** is defined in section 251B.
>
> Under s. 190C(4A), the certification of an application under Part 11 by a representative Aboriginal/Torres Strait Islander body is not affected where, after certification, the recognition of the body as the representative Aboriginal/Torres Strait Islander body for the area concerned is withdrawn or otherwise ceases to have effect.

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

[53] Schedule R indicates that a copy of the certificate of the representative Aboriginal body accompanies the application at Attachment R. Accordingly, I am of the view that it is necessary to consider whether the requirements of s. 190C(4)(a) are met.

The nature of the task at s. 190C(4)(a)

[54] Section 190C(4)(a) imposes upon the Registrar conditions which, according to Mansfield J, are straightforward — *Doepel* at [72]. His Honour noted that the Registrar is to be 'satisfied about the fact of certification by an appropriate representative body', but is not to 'go beyond that point' and 'revisit the certification of the representative body' — at [78], [80] and [81]; see also *Wakaman People #2 v Native Title Registrar* [2006] FCA 1198 at [32]. I therefore consider that my task here is

to identify the appropriate representative body and be satisfied that the application is certified under s. 203BE.

[55] Once satisfied that the requirements of s. 190C(4)(a) have been met, I am not required to 'address the condition imposed by s 190C(4)(b)' — *Doepel* at [80].

Identification of the representative body and its power to certify

[56] Attachment R is entitled 'Certification of the Pilki Native Title Claimant Application — WAD 6002/2002' (certification). It is dated 28 August 2013 and signed by the Chief Executive Officer of Central Desert.

[57] The certificate states that the statements and reasons within the certificate are made pursuant to s. 203FEA(1) of the Act. Schedule K of the application provides that the Central Desert is a body to whom money has been granted under s. 203FE for the purpose of enabling the body to perform some or all of the functions of a representative body.

[58] If a body is funded under s. 203FE(1) to perform the functions, including the certification in s. 203BE, of a representative body over an area, then that body will have the power to certify an application under Part 11.

[59] The geospatial assessment identifies the Central Desert to be the only representative body for the area covered by the application.

[60] Having regard to the above information, I am satisfied that the Central Desert was the relevant s. 203FE funded body for the application area and that it was within its power to issue the certification.

The requirements of s. 203BE

[61] As mentioned above, I consider that I am only required to be satisfied of 'the fact of certification' and am not permitted 'to consider the correctness of the certification by the representative body' — *Doepel* at [78] and [82].

[62] Accordingly, I must consider whether the certification meets the requirements of s. 203BE, the relevant subsection being (4).

Subsection 203BE(4)(a)

[63] This provision requires a statement from the representative body confirming that they hold the opinion that the conditions at subsections (2)(a) and (2)(b) have been met.

[64] Subsection 203BE(2) sets out that a representative body must not certify 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.

[65] The certification contains the statement required by s. 203BE(4)(a) — at [2] and [3].

Subsection 203BE(4)(b)

[66] Pursuant to s. 203BE(4)(b), the certification must also briefly set out the body's reasons for making the required statements under s. 203BE(4)(a).

[67] In that regard, the certification sets out details pertaining to the authorisation of the applicant, including that:

- Central Desert, and its predecessor Ngaanyatjarra Council Native Title Unit, have provided legal and anthropological services within the application area since 1995 — at [4].
- Central Desert staff have attended numerous meetings of the native title claim group, including meetings where the current application has been discussed, and have observed the process of decision making, which is in accordance with their traditional laws and customs — at [5] and [6].
- Central Desert is of the opinion that the requirements of authorisation pursuant to the Act have been complied with to authorise the persons comprising the applicant to make the application and deal with matters arising in relation to it in accordance with their traditional decision making process — at [6].
- Central Desert is satisfied that the consultant anthropologist who worked with the native title claim group made all reasonable efforts to ascertain and identify all the members of the native title claim group — at [7].

[68] I am of the opinion that the certificate meets the requirement of s. 203BE(4)(b).

Subsection 203BE(4)(c)

[69] This subsection applies where the application area is covered by an overlapping application for determination of native title.

[70] I do not consider that any application currently overlaps the application area — see my reasons at s. 190C(3) above. Accordingly, in my view, the requirements of s. 203BE(3) are not applicable to the area covered by this application and, therefore, it is appropriate that the certification is silent on s. 203BE(4)(c).

[71] I am of the view that the requirements of s. 203BE(4) of the Act have been satisfied.

[72] For the reasons set out above, I am satisfied that requirements of s. 190C(4)(a) are met.

[73] The application **satisfies** the condition of s. 190C(4).

Merit conditions: s. 190B

Subsection 190B(2)
Identification of area subject to native title

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

[74] Attachment B contains a metes and bounds description of the external boundaries of the application area, referencing geographic coordinates. The description specifically excludes all the land comprising Reserve 30490 and Reserve 34720.

[75] Attachment C is a colour copy of a map titled 'Pilki People – Native Title Application WAD6002/2002 (WC02/3)' prepared by Native Title Spatial Services on 19 February 2013. The map includes:

- the application area depicted by a blue outline and blue hatching;
- land tenure colour coded and labelled;
- scalebar, coordinate grid, legend and locality map; and
- notes relating to the source, currency and datum of data used to prepare the map.

Consideration

[76] The geospatial assessment states that the area covered by the application has been amended and reduced and concludes that the description and map of the application area are consistent and identify the application area with reasonable certainty. I agree with this assessment.

[77] In light of the above information, I am satisfied that the description and the map of the application area, as required by ss. 62(2)(a) and (b), are sufficient for it to be said with reasonable certainty that the native title rights and interests are claimed in relation to particular land or waters.

[78] The application **satisfies** the condition of s. 190B(2).

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

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

[79] Schedule 2 of the orders and determination sought contains the following description of the native title claim group:

> (1) The Pilki Native Title Holders are persons who:

(a) have rights in part or all of the [application area] through: descent from an ancestor born within the area; conception and/or being born within the area; having ritual authority to make decisions about religious locations and land within the area; and

(b) are recognised under their traditional laws and customs by other Pilki native title holders as having rights in the [application area].

(2) At the date of this [application] the persons referred to in (1) includes the following:

(a) the descendants of the following people:

- Tjiru (Kennedy family)
- Tarrpi (Willis family)
- Ulan (West family)
- Palapala (Barton family)
- Wiltjawarra (Sinclair, Gordon family links with Scott, Felton, Willis)
- Ngunimpi (Scott, Winter and Hogan family)
- Nganawarra (Scott family)
- Utjil (Graham family)
- Kukukuku (Scott family)
- Nakarra (Scott family – links to Brown, Macarthur, Laidlaw)
- Pipin (Stokes, Forrest, Tucker, Wesley, McCarthy family)
- Ninakata (Bilsen family)
- Kuruyilinya (Macathur, Laidlaw family)
- Angkatji (Currie family)
- Minimimpi (Dimer family)
- Jimmy Kangaroo (Flynn family)
- Dean and Ruby (Walker and Nudding family)
- Tjartjanya and Iame Charlie (Carmody and Edwards family)
- Lily, Hedley and Robbie (Robinson/Franks family)
- Felton (Rice, Anderson family)
- Wimpana (Lynch family)
- Nunayi (Ridley family); and
- Ruby and Adana (Dodd family)

(b) the following people:

- Roy Underwood
- Ned Grant
- Fred Grant
- Mark Anderson (already listed spouse in Felton/Rice family)
- Lawrence Pennington (spouse in Felton/Rice family)

- Leonard Walker
- Ian Rictor
- Debbie Hansen
- Elaine Thomas
- Angelina Woods

Temporary Note – The list of people in 2(b) will need to be finalised immediately prior to the determination being made.

[80] In my view, s. 190B(3)(a) is only applicable in circumstances where the names of *all* the persons in the native title claim group are provided. As only some of the persons in the native title claim group are identified in the above description, I am of the view that the condition of s. 190B(3)(b) applies. Thus, I am required to be satisfied that the persons in the native title claim group are described sufficiently clearly so that it can ascertained whether any particular person is in that group.

Nature of the task at s. 190B(3)(b)

[81] When assessing the requirements of this provision, I understand that I must determine whether the material contained in the application 'enables the reliable identification of persons in the native title claim group' — *Doepel* at [51].

[82] In *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), Dowsett J commented that s. 190B(3) 'requires only that the members of the claim group be identified, not that there be a cogent explanation of the basis upon which they qualify for such identification' — at [33]. His Honour expressed the view that where a claim group description contained a number of paragraphs, 'consistent with traditional canons of construction', the paragraphs should be read 'as part of one discrete passage, and in such a way as to secure consistency between them, if such an approach is reasonably open' — at [34]. His Honour also confirmed that s. 190B(3) required the Registrar to address only the content of the application — at [30].

[83] In *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 (*WA v NTR*), Carr J commented that to determine whether the conditions (or rules) specified in the application has a sufficiently clear description of the native title claim group:

> [i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently. It is more likely to result from the effects of the passage of time and the movement of people from one place to another. The Act is clearly remedial in character and should be construed beneficially — at [67].

Consideration

[84] I understand that there are two (2) elements of the Pilki native title claim group description. The first is set out in paragraph (2)(a) of Schedule 2, being the descendants of the identified ancestors. The second element is set out in paragraph (2)(b) of Schedule 2 which contains a list identifying certain people who I understand to be already members of the claim group. I am of the view that this description is to be read as a discrete whole — *Gudjala 2007* at [34].

[85] I understand that the first element contains a number of conditions, as detailed under paragraphs (1)(a) and (b) of Schedule 2, which I need to be satisfied enables the ascertainment of whether any particular person is in the claim group. Those criteria include that membership may be by descent, birth or conception in the application area and by having ritual authority to make decisions about religious locations and land within the application area — Schedule 2 at (1)(a). Membership is further qualified by the additional criteria of including those persons who are recognised by other Pilki people, under their traditional laws and customs, as having rights in the application area — at (1)(b). I will discuss each criteria below before deciding whether I am satisfied that the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

[86] In respect of the second element, I understand that it contains a list of persons who have been identified to be a member of the Pilki native title claim group by descent, conception and/or birth, having ritual authority and recognised by other Pilki people, under their traditional laws and customs, as having rights in the application area. I have formed this view from the wording in Schedule 2 that 'the persons referred to in (1) includes the following … people' — at (2)(b). I do not consider this list to be exhaustive. I note that following the list at paragraph (2)(b) is a temporary note, which states that the identified persons will need to be finalised immediately prior to the determination of native title being made. I understand that the composition of a native title claim group is not fixed, rather it is flexible and changes with time. I understand this note to indicate that the most up-to-date information will be provided prior to the determination of native title being made and that at the time of making this registration decision, the most current information has been provided.

[87] I note that in reaching my view, I have been informed by the applicant's factual basis material contained in the application and accompanying documents and not the additional material provided as I consider that I am confined to the material contained in the application for the purposes of s. 190B(3). In particular, the factual basis that I have considered in reaching my view is contained in the further amended statement of claim which accompanied the application.

Descent

[88] The first criterion of the first element includes those persons who are descended from an apical ancestor born within the application area. My understanding is that the biological descendants of the persons listed in paragraph (2)(a) of Schedule 2 will meet the first criterion of the first part of the claim group description. I understand that it is those ancestors identified in paragraph (2)(a) that were born in the application area. I have reached this view by considering the wording in paragraph (2)(a) of Schedule 2 which states that 'the persons referred to in (1) includes the … descendants of the following people'.

[89] I consider that requiring a member to show biological descent from the ancestors identified in paragraph (2)(a) provides a clear starting or external reference point to commence any inquiry about whether a person is a member of the native title claim group.

[90] I note that describing a claim group in reference to named ancestors is one method that has been accepted by the Court as satisfying the requirements of s. 190B(3)(b) — *WA v NTR* at [67].

[91] I am of the view that with some factual inquiry it will be possible to identify the persons who fit this criterion of the native title claim group description.

Birth/conception

[92] This criterion includes those persons who have been conceived or born within the application area.

[93] I consider that requiring a member to demonstrate that they were born or conceived in the application area provides a clear starting or external reference point to commence any inquiry about whether a person is a member of the native title claim group.

[94] Describing a claim group in reference to birth is another method that has been accepted by the Courts — *De Rose v State of South Australia* [2002] FCA 1342 (*De Rose*) at [926].

[95] I am of the view that with some factual inquiry it will be possible to identify the persons who fit this criterion of the native title claim group description.

Ritual authority

[96] I have been informed of the role of ritual authority in Pilki traditions by considering the factual basis material contained in the further amended statement of claim. I understand from this information that knowledge of the *Tjukurrpa* (Dreamings that are responsible for the existence and form of the landscape and govern the rules by which people live and society is organised) determines whether a person has ritual authority to make decisions about sacred locations and land within the area — further amended statement of claim at [18], [19] and [26]. Through initiation a person learns about the *Tjukurrpa* of their community and country — at [25]. Further, '[i]nitiation confers an enhanced status on a person; including in relation to matters of secret and sacred knowledge and access to and responsibility for the *Tjukurrpa* and places and areas associated with *Tjukurrpa*; and including in relation to authority in decision making about country' — at [26].

[97] I find the following comments of O'Loughlin J in *De Rose*, albeit in obiter, of assistance in reaching a view about this criterion:

> [i]n their principal submissions, the claimants identified the native title claim group in the following terms:
>
> > *"The application is made by the named individuals on their own behalf and on behalf of other individuals who fulfil the criteria of nguraritja according to traditional law and custom."*
>
> Therefore, to identify who is a member of the native title claim group that seeks a determination of native title over the claim area, it is necessary to examine the rules that govern the right to be called *Nguraritja* for the claim area. In Attachment E to their final submissions, the claimants adopted the findings of Mr Craig Elliott, who identified the four major reasons by which Aboriginal people could be *Nguraritja* under traditional laws and customs. The individual might have been born on the claim area or, even though not born there, he or she might have had a long-term physical association with the claim area. Then again, he or she may have had an ancestral association with the claim area. Finally, the person might have geographical and religious knowledge of the claim area to such a degree that the person will qualify as *Nguraritja*. I find that, for an Aboriginal person to be *Nguraritja* under traditional laws and customs as described by the claimants, the person must satisfy at least one of the four criteria listed above. But there is one further factor that is an essential criteria to being *Nguraritja*: the individual must be acknowledged as *Nguraritja* for his or her land by the other *Nguraritja*. I am satisfied that these factors are the major criteria by which people may be *Nguraritja* for De Rose Hill …

> Some other methods were put forward by the different witnesses [which were] not … traditional [but] by which an Aborigine could become *Nguraritja*.
>
> By an application of the above criteria it is possible, in my view, to conclude who is, and who is not *Nguraritja* for the claim area. It is not necessary that every single applicant be personally named, although they do need to be identified by a set of appropriate criteria: see *Risk v National Native Title Tribunal* [2000] FCA 1589 at [43]; *Ngalakan People v Northern Territory of Australia* [2001] FCA 654 at [53]; *Russell v Bissett-Ridgeway* [2001] FCA 848 at [18-19] … In the circumstances, I am satisfied that the applicants have adequately established a method by which the members of the potential native title claim group may be identified — at [926] to [928].

[98] I note that the Court has also accepted forms of ritual authority in other matters as a method of identifying who may comprise the claim group — see for instance *Gumana v Northern Territory (No 2)* [2005] FCA 1425 at clause 2 and 3.

[99] Having regard to the comments of O'Loughlin J in *De Rose* and the facts relevant to this particular matter outlined above, I am of the view that with some factual inquiry it would be possible to determine the persons who have ritual authority to make decisions about religious locations and land within the application area.

Recognition

[100] As noted above, I am of the view that the description of the native title claim group is to be read as a discrete whole and recognition as a Pilki person is not meant to be a stand alone criterion. Rather, it is a qualifier to membership by descent or by birth/conception. I discuss below my reasons for coming to this view, including the relevant case law that have considered recognition as a criterion of itself.

[101] I note that a description of membership containing qualifiers of recognition is not one with an external and objective point of reference from which to commence an inquiry.

[102] While not addressing the requirements of s. 190B(3), Dowsett J in *Aplin on behalf of the Waanyi Peoples v State of Queensland* [2010] FCA 625 (*Aplin*) considers the complexities relating to the criteria for the membership of the claim group and the internal perspective of the group, which, as a matter of necessity, determines its composition. His Honour, whilst dealing with, among other things, a request to change the native title claim group description to include a criterion of descent from another apical ancestor not identified in the application, stated that:

> for the purposes of the [Act], it is the claim group which must determine its own composition … The claim group must assert that, pursuant to relevant traditional laws and customs, it holds Native Title over the relevant area. It is not necessary that all of the members of the claim group be identified in the application. It is, however, necessary that such identification be possible at any future point in time. A claim group cannot arrogate to itself the right arbitrarily to determine who is, and who is not a member. As to substantive matters concerning membership, the claim group must act in accordance with traditional laws and customs — at [256].

[103] Dowsett J referred to the decision of the High Court in *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) 214 CLR 422; 194 ALR 538; [2002] HCA 58 (*Yorta Yorta*) where it was found that the existence of a society depended upon mutual recognition within the group. His Honour also referred to the decision in *Sampi v State of Western Australia* [2005] FCA 777 where French J, at [820], stated that identification as a member involved an internal perspective of the group — *Aplin* at [258]. The decision of French J was appealed and the Full Court stated that:

> [a] relevant factor among the constellation of factors to be considered in determining whether a group constitutes a society in the *Yorta Yorta* sense is the internal view of the members of the group … The unity among members of the group required by *Yorta Yorta* means that they must identify as people together who are bound by the one set of laws and customs or normative system — *Sampi v State of Western Australia* [2010] FCAFC 26 at [45].

[104] I understand from the factual basis material that the Pilki native title claim group are a closely linked group united by a common ancestry and by their acknowledgement and observance of a body of laws and customs — further amended statement of claim at [5]. The members of the claim group have a connection to the application area by their traditional laws and customs under which the traditional rights and interests have been transmitted to them by descent or by their own birth or conception — at [39]. Pilki people who possess rights or interests in an area do not have equal authority in relation to that area and are not equally entitled to speak for or participate in decision making about that area — at [9]. The amount of authority a person has depends on:

(a) their age, gender, social and/or ritual knowledge and seniority, knowledge of the country and its resources, the extent to which they actively participate or have actively participated in the care and use of the area; and

(b) the extent to which the person asserts such authority and in turn the extent to which the assertion of authority is *accepted by others* [emphasis added] — at [9].

[105] Having regard to the above information, it is my view that recognition as a Pilki person is linked to their connection to the land. I understand that a person may be connected to an area by birth or conception in that area or if their predecessor was born and associated with that area. It follows that, in my view, recognition is inherently linked to the recognition of one's biological descent from a named ancestor or by birth/conception within the application area. It is through this connection that other Pilki people recognise whether a person is a member of their claim group.

Conclusion

[106] In my view, the description of the native title claim group contained in the application is such that, on a practical level, it can be ascertained whether any particular person is a member of the group. Accordingly, focusing only upon the adequacy of the description of the native title claim group, I am satisfied of its sufficiency for the purpose of s. 190B(3)(b).

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

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

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

[108] The task at s. 190B(4) is to assess whether the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified. In my opinion, that description must be understandable and have meaning — *Doepel* at [91], [92], [95], [98] to [101] and [123]. I understand that in order to assess the requirements of this provision, I am confined to the material contained in the application itself — at [16].

[109] I note that the description referred to in s. 190B(4), and as required by s. 62(2)(d) to be contained in the application, is:

> 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 …

[110] I will consider whether the claimed rights and interests can be prima facie established as native title rights and interests, as defined in s. 223, when considering the claim under s. 190B(6) of the Act. For the purposes of s. 190B(4), I will focus only on whether the rights and interests as claimed are 'readily identifiable'. Whilst undertaking this task, I consider that a description of a native title right and interest that is broadly asserted 'does not mean that the rights broadly described cannot readily be identified within the meaning of s 190B(4)' — *Strickland* at [60]; see also *Strickland FC* at [80] to [87], where the Full Court cited the observations of French J in *Strickland* with approval.

[111] The orders and determination sought provides the following description of the claimed native title rights and interests:

> **The nature and extent of native title rights and interests (s225(b); s 225(e))**
>
> 3. Subject to Orders 4, 5 and 6 the nature and extent of the native title rights and interests is the right of possession, occupation, use and enjoyment as against the whole world.
>
> **Qualifications on native title rights and interests (s225(b); s 225(e))**
>
> 4. The native title rights and interests are exercisable in accordance with, and subject to, the:
>
> (a) traditional laws and customs of the native title holders; and
>
> (b) laws of the State and the Commonwealth, including the common law.
>
> 5. For the avoidance of doubt the nature and extent of native title rights and interests in relation to water in any watercourse, wetland or underground water source as defined in the *Rights in Water and Irrigation Act 1914* (WA) as at the date of this [application] is the non-exclusive right to take, use and enjoy that water.
>
> 6. Notwithstanding anything in this [application], there are no native title rights and interests in the [application] Area, in or in relation to:
>
> (a) minerals as defined in the *Mining Act 1904* (WA) (repealed) and the *Mining Act 1978* (WA); or

(b) petroleum as defined in the *Petroleum Act 1936* (WA) (repealed) and in the *Petroleum and Geothermal Resources Energy Act 1967* (WA); or

(c) geothermal energy resources and geothermal energy as defined in the *Petroleum and Geothermal Energy Resources Act 1967* (WA).

[112] The further amended statement of claim also provides the following relevant information:

Rights and interests possessed under the traditional laws and customs

37. Rights and interests in relation to the claim area that exist under, and which may be held and exercised subject to and in accordance with, the traditional laws and customs (apart from extinguishment, and recognition by the common law) are rights of ownership of the claim area, being rights to:

(a) access, remain in and use the claim area;

(b) access resources and to take for any purpose resources of the claim area; and

(c) control access to and use of the claim area and the resources of the claim area by others, including so as to maintain and protect places and objects of significance,

(the traditional rights and interests).

Possessors of the traditional rights and interests

38. The traditional rights and interests are possessed under the traditional laws and customs by the members of the claim group.

…

Native title rights and interests

40. The nature and extent of the traditional rights and interests possessed by the members of the claim group under the traditional laws and customs which:

(a) have not been extinguished;

(b) are recognisable by the common law; and

(c) are native title rights within the meaning of section 223(1) of the *Native Title Act*,

as is set out in the determination sought at Order [3] (**native title rights and interests**).

Consideration

[113] I understand the description above to be a claim by the native title claim group to a right to exclusive possession — see also applicant's submissions at [24].

[114] For the purposes of s. 190B(4), I am satisfied that the rights and interests identified are understandable and have meaning.

[115] I find that the description of the native title rights and interests claimed is sufficient to allow the rights and interests to be readily identified and that therefore the application satisfies the condition of s. 190B(4).

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

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

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

[117] I consider each of the three assertions set out in the three paragraphs of s. 190B(5) in turn in my reasons below.

The requirements of s. 190B(5) generally

[118] Whilst assessing the requirements of this provision, I understand that I must treat the asserted facts as true and consider whether those facts can support the existence of the claimed native title rights and interests that have been identified — *Doepel* at [17] and *Gudjala People #2 v Native Title Registrar* [2008] FCAFC 157 (*Gudjala FC*) at [57] and [83].

[119] Although only a general description of the factual basis is required, the Full Court in *Gudjala FC* noted that 'the general description must be in sufficient detail to enable a genuine assessment of the application by the Registrar … and be something more than assertions at a high level of generality' — at [92].

[120] Accordingly, although the facts asserted are not required to be proven by the applicant, I consider the factual basis must provide sufficient detail to enable a 'genuine assessment' of whether the particularised assertions outlined in subsections (a), (b) and (c) are supported by the claimant's factual basis material. Further, I note that where the applicant's material contains assertions that 'merely restate the claim' or 'is really only an alternative way of expressing the claim or some part thereof', that material 'does not assist in building the factual basis necessary for assessing the application' — *Gudjala People #2 v Native Title Registrar* [2009] FCA 1572 (*Gudjala 2009*) at [28] and [29] and *Anderson on behalf of the Numbahjing Clan within the Bundjalung Nation v Registrar of the National Native Title Tribunal* [2012] FCA 1215 (*Anderson*) at [43] and [48].

[121] I am therefore of the opinion that the test at s. 190B(5) requires adequate specificity of particular and relevant facts within the claimants' factual basis material going to each of the assertions before the Registrar can be satisfied of its sufficiency for the purpose of s. 190B(5).

[122] The factual basis material is contained in the further amended statement of claim at [5] to [43]. The applicant has also submitted directly to the Registrar additional confidential material in support of the factual basis. This material includes:

- the applicant's submissions dated 18 October 2013;
- a draft connection report for the claim dated January 2009, prepared for the purposes of mediation (connection report);

- a redacted supplementary connection report dated 17 March 2010 (supplementary report);
- affidavits sworn by [name deleted] dated 18 November 2002 and 30 March 2010 (first and second affidavits of [name deleted]);
- affidavits sworn by [name deleted] dated 7 December 2004 and 30 March 2010 (first and second affidavits of [name deleted]).

[123] I proceed with my assessment of the sufficiency of the factual basis material by addressing each assertion below.

Relevant society

[124] The identification of a pre-sovereign society or a society that existed prior to European contact of the application area is relevant to my assessment of the assertions at s. 190B(5). In particular, I am of the view that identification of such a society is necessary to support the assertion of a connection between that society and the apical ancestors as well as a connection with the current native title claim group. I consider the following facts to be relevant to my consideration of whether the factual basis is sufficient to support the existence of such a society.

[125] I understand the connection report provides the following relevant information:

- The claimants belong to the Western Desert society, commonly referred to as the Western Desert Social and Cultural Bloc. This society consists of 'people who have common congenial social and territorial relations structured according to similar traditional laws and customs set in physiographic association with the western part of the arid heartland of Australia' — at [179]. The Western Desert people 'adhere to, operate and are defined by various laws and customs so that one has, in effect, diffusive intra-social variability expressed as a series of cultural sub-regions which, in concert, effect a broad and loosely constructed social identity' — at [182]. The people of the Western Desert speak a similar language, but there are at least 13 dialects and neighbouring groups may only understand each other — at [183].
- The Western Desert people have a similar pattern of classificatory kinship, but there are differences between the southern, northern and central west parts of that society. The southern people use a two (2) part kinship system — at [184].
- Traditional laws also vary between the different regions of the society in relation to customary justifications for claiming rights in land. In the southern region, birth and birth related events are the primary mechanism for obtaining rights in land, although rights can also be obtained through other mechanisms but they carry less weight — at [185].
- Knowledge of religious law or the *Tjukurrpa* (Dreamings) effects power and authority in Western Desert society and country. The essential principles are constant across the desert but linkage between particular religious narratives (Dreaming stories) and country is regional in orientation and not all narratives pass through every part of the desert as it depends on the Dreaming tracks left behind by the Dreaming beings. In particular, many *Tjukurrpa* located in the southern part are not found in the north and similarly the *Tjukurrpa* in the north may not be found in the south — at [186] and [187].

- The claim group belongs to a southern sub-region of Western Desert society known as the 'Aluridja'. The groups in this region share a common culture and the defining elements of the laws and customs that characterise this sub-region are kinship, dialect, subsistence practices, religious beliefs, ceremony and acquisition of decision-making rights in land — at [188] and [189]. Members of different groups within this society may identify with other groups in that society depending on the dialect they speak — at [194].
- Although the claimants adhere to the customary fundamentals of the southern Western Desert, and are therefore members of that society, there are differences between how some of these traditions are perceived and articulated within the claim group including the linguistic characteristic of the group, their composite system of kinship and the way the group relate to land as a consequence of their understanding of the implications of the *Tjukurrpa* — at [190] and [232].
- Cultural divide within the group, based on differing historical experience and cultural differences derived from the nature of the southern Western Desert laws and customs namely dialectal and differing systems of social classifications, means there are two (2) communities within the claim group, namely the *Anangu* and the *Wongatha* — at [193] and [233]. The Pilki People are therefore also members of the Ngaanyatjarra and Spinifex native title holding groups (collectively referred to as *Anangu*) and the *Wongatha* community — at [2].
- Despite the two (2) communities, there is a common social association through biological links that bind families within the claim group — at [234].

[126] My understanding of the factual basis material is that the Western Desert society is said to encompass a wide area of land which is held at a localised level by various groups, including the Pilki people. I understand that these landholding tribes are similar through common social and territorial relations in accordance with similar laws and customs but there are differences in their language dialect, system of kinship, how one can claim rights to land and belief in the *Tjukurrpa*. Members of each group may have ties to other groups on the basis of the dialect they speak or other historical or social connection and therefore identify with more than one group. In particular, members of the Pilki claim group are also members of the Ngaanyatjarra and Spinifex native title holding groups, namely the *Anangu*, and the *Wongatha* people. The social and cultural variability amongst the Western Desert society means that the society can be divided into sub-regions such as the Aluridja in the southern region.

[127] In my view, the factual basis demonstrates that the Pilki people belong to a southern sub-region of the Western Desert society known as the Aluridja. The Pilki country is said to be situated within this society and their traditional laws and customs are said to be derived from it. In my view, within this society, the rights and interests in land that are asserted to be held by the Pilki are based on regionally held laws and customs. Relevant to this proposition, I note the observations of Lindgren J in *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 5)* [2003] FCA 218 (*Harrington-Smith*) that:

> [i]t is conceivable that the traditional laws and customs under which the rights and interests claimed are held might, in whole or in part, be also traditional laws and customs of a wider population, *without that wider population being a part of the claim group* [emphasis added] — at [53].

[128] The factual basis reveals that the laws and customs currently observed and acknowledged by the Pilki People are based on common principles of kinship and include observance of laws relating to land tenure and traditional usage of the resources of their land and waters. The content of the traditional laws and customs is said to have been passed down to the current members of the native title claim group through the preceding generations — see my reasons at s. 190B(5)(b) below.

[129] In my view, the factual basis demonstrates that at least some of these ancestors were living within Pilki country, or were amongst the generation born to those who were living within Pilki country, at the time of first European contact. In this sense, I understand that the information supports the assertion that at least some of the apical ancestors were born into the Pilki claim group of the southern Western Desert society that existed at and prior to European contact — see *Gudjala 2009* at [55] and also my reasons at s. 190B(5)(a) below.

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

The requirements of s. 190B(5)(a)

[130] In *Gudjala 2007*, Dowsett J indicated that the condition at s. 190B(5)(a) required 'evidence [of] an association between the whole group and the area', although not 'all members must have such association at all times' — at [52]. His Honour also commented that 'there must be evidence as to such an association between the predecessors of the whole group and the area over the period since sovereignty' — at [52].

[131] The factual material must also be sufficient to support an asserted association with the entire claim area, rather than an association with only a part of it, and must contain more than 'very broad statements', which for instance have no 'geographical particularity' — *Martin v Native Title Registrar* [2001] FCA 16 (*Martin*) at [26]; see also *Corunna v Native Title Registrar* [2013] FCA 372 at [39] and [45] where Siopis J cited the observations of French J in *Martin* with approval.

General assertions

[132] The applicant's submissions dated 18 October 2013 provide general assertions that, in summary, assert that members of the native title group occupy, and their predecessors occupied, the area at the time of sovereignty and that their association is documented and photographed in the connection material, namely the connection report and the supplementary report, and the affidavits of the persons comprising the applicant — at [12] to [14].

[133] The further amended statement of claim provides that sovereignty occurred in 1829, however there was no contact with the application area until the early 1900s — at [2] and [3].

Association of the predecessors of the native title claim group with the application area

[134] I consider that the connection material and the affidavits provide more specific information that is relevant to the association of the predecessors with the application area. I understand that this material provides the following relevant information:

- The Pilki People claim that 'Pilki country' encompasses a wider area which includes the application area — supplementary report at p. 5. Within this wider country, they hunt, travel and perform other traditional practices.

- Historical records indicate that the first explorers passed the northern boundary of the Pilki claim area around 1891, where the presence of Aboriginal people in the claim area were noted — connection report at [100].
- Around the mid-1890s, Aboriginal people were seen near the northern boundary of the claim area, which an anthropologist says could have been the parents and grandparents of the current native title claimants. Camping areas, camp fires and tracks were seen, and the Aboriginal people were heard singing — at [101].
- Historical records of the early 1900s refer to some of the Pilki ancestors, indicating that their predecessors may have occupied the claim area from the 1870s to 1890s — at [331].
- The anthropological material indicates that the Pilki predecessors had a strong knowledge and association with their country allowing them to travel long distances away from their traditional lands and then returning back again to their proper country demonstrating an understanding of the boundaries of their country — at [118].
- Government records from 1920 indicate that about 2,000 Aboriginal people were in occupation of a wide area, which included the claim area — at [102].
- From the 1920s to the 1950s, many Pilki people travelled, or were moved, to missions and ration depots located in areas north and south of the claim area. This was explainable by various events including the construction of the Trans-Australian Railway Line and atomic testing in areas east of the claim area. However, some records indicate that a number of claim group members were still living in the claim area and some claimants continued to be born in the desert around this time — at [107], [113], [115], [120], [125] and [133].
- Anthropological material from the 1930s and 1940s noted considerable Aboriginal activity in mission areas such as large ceremonies. Such material also recorded the presence and relationships of a number of Pilki predecessors in areas north of the claim area — at [122]. Mission records of the 1950s and 1960s indicate that spiritual forces were a strong factor in their lives and traditional ceremonies and practices were still being performed — at [148].
- The establishment at Cundeelee (south of the claim area) acted as a base from which traditional domestic routine, subsistence hunting and gathering, social activity and limited ceremonial activity continued — at [129]. In the establishment at Warburton (north of the claim area), many Aboriginal people continued living their traditional lifestyle which they had lived for generations — at [132] and [133]. They visited their traditional lands including birth places of their parents, participated in traditional activities, and children learnt traditional stories of their tribe and people — at [132].
- Around the 1980s, some claim group members travelled back to Jubilee Lakes and Pilki (both located in the central-east region of the claim area), returning back to and remaining in the application area — at [157] and [158].
- Early genealogical evidence relating to the general area of the claim shows a desert ancestry from the 1870s. For instance, the genealogies identify an Aboriginal man, born around the 1870s, who is said to be a predecessor of a number of claim group families including the Bilsen, West, Stokes, Ridley and Forrest families — at [102]. More current

genealogical evidence, as well as the affidavit material, show that many of the apical ancestors and other Pilki people were born within the claim area or proximate to the claim area (within the wider Pilki country) or were associated with areas in Pilki country, including:

Tjiru, an apical ancestor, was the grandmother of one of the persons comprising the applicant. Upon my recounting of the history, she was born around the 1870s in Panparra, which is proximate to the north-eastern boundary of the claim area — at [27]. Tjiru's country was described to be from Panparra and south through the Pilki application area — at [27]. She spent a lot of time walking and hunting in Pilki country, especially around Coolgubbin, which is located in the mid-western region of the claim area — the first affidavit of [name deleted] at [5]. Tjiru's daughter, [name deleted], was also born in [place name deleted] — connection report at [28].

- [Name deleted] married a Pilki man, [name deleted], who was born at [place name deleted], which is in the central region of the claim area — at [28] and [29]. [Name deleted]'s brother was also born at [place name deleted] and their parents were born at [place name deleted], which is proximate to the north-eastern boundary of the claim area — at [29]. Their country was described to encompass the northern region of the claim area — at [29]. [Name deleted]'s brother married an Aboriginal woman whose father was from [place name deleted], which is an area proximate to the eastern boundary — at [30]. Her sister also had country adjacent to the eastern boundary, from [place name deleted] to [place name deleted]. She was said to have died near the eastern boundary of the claim area after damaging stones at a sacred site there, which resulted in sickness, said to be from supernatural causes — at [30]. She is buried in [place name deleted] — at [30].
- [Name deleted] also had a sister, Ruby who is another named ancestor. She married [name deleted] who is an antecedent of the [name deleted] family — at [30].
- Ancestor Tjiru had a brother, Tarrpi, who is another identified ancestor of the Pilki native title claim group — at [31]. Tarrpi had three (3) sons including [name deleted] who had his 'own water' located at [place name deleted] (central-north region of the Pilki claim area) before leaving to live at ration depots — at [107]. He was a well-known historical figure responsible for travelling to the north and finding family living east and adjacent to the claim area around the 1950s. He located many claim group families and individual members who form part of the Pilki claim group. During this trip he told many of the current senior Spinifex People about *Tjukurrpa* and locations of sites within the application area — at [136]. He is buried at [place name deleted] — at [31].
- Ancestor Tarrpi had another son, [name deleted], who is the father of one of the persons comprising the applicant — at [31]. [Name deleted] was born at [place name deleted] (proximate to the north-eastern boundary) and married an Aboriginal woman whose country is adjacent to the eastern boundary of the claim area — at [33]. Her father, Palapala, is another identified ancestor — at [35].
- The [name deleted] family are said to be associated with areas adjacent to the northern and north-eastern boundaries of the application area — at [36]. Ulan, an identified ancestor, is said to have had two (2) wives and was from Wartitika, located

in the central north region of the claim area — at [37]. His wives married another man and one of their sons, from the second marriage, was also born in [place name deleted] — at [38].

— Ulan's brother is associated with the *Marlu* (Red Kangaroo) *Tjukurrpa* which runs through [place name deleted], proximate to the northern boundary of the application area — at [56]. His daughter, who was also associated with the [place name deleted] area, was married to an Aboriginal man who was from [place name deleted] and was associated with the Emu *Tjukurrpa* that came from [place name deleted], which is located adjacent to the north eastern boundary of the application area — at [57]. His niece was also born at [place name deleted] — at [59].

— Ruby and Adana, named ancestors, were sisters. Ruby was born in 1901 and was married to an Aboriginal man who had ties to the Pilki claim area — at [41]. One of their sons was married to an Aboriginal woman, whose father's mother was Wiltjawarra, another identified ancestor — at [44]. They have ties to areas north of the application area — at [44]. Wiltjawarra also had two (2) grandsons. One married the granddaughter of ancestors Ngunimpi and Nganawarra and the other married the great granddaughter of married ancestors Kukuku and Nakarra — at [46].

— Ancestors Ngunimpi and Nganawarra were married. Their daughter is associated with the northern and central regions of the application area from [place name deleted], located in the middle-east, to areas north of the application area — at [48]. Ngunyimpi's second wife was born proximate to the eastern boundary of the application area — at [53].

— Ancestor Nakarra had previously been married to ancestor Kuruyilinya — at [49]. Kuruyiliny's children from his other marriages were all born proximate to the northern boundary of the application area — at [53].

— Pipin, another named ancestor, was from the north-eastern region of the application area, near a waterhole called [place name deleted] — at [61].

— Ancestor Ninakata was born around the 1840s or 1850s (according to my recounting of the history) — at [68]. His grandson was born in the western region of the application area, at a site called [place name deleted] — at [66].

— Angkatji, another identified ancestor, was from country within the south-eastern boundary of the application area — at [69].

— Ancestor Jimmy Kangaroo was born around the 1880s (according to my recounting of the history) — at [74]. His son came from [place name deleted], which is located north of [place name deleted] about 10 to 15 km east of the application area, within the wider Pilki country, and is said to have 'grown up' senior Spinifex men showing 'them how to get rabbits and use a spear' — at [74].

— Ancestor Felton's brother came from an area proximate to the eastern boundary, just north of [place name deleted], within the wider Pilki country — at [81]. Felton's daughter is said to have been born at [place name deleted], which is adjacent to the claim area, and currently lives at [place name deleted] — at [81].

— Wimpana, an identified ancestor, was born in the mid to late 1800s — at [83]. Her granddaughter was from [place name deleted] and was likely to be associated with the areas such as [place names deleted] when she was a child — at [83]. The bush name of Wimpana's great granddaughter, a current claim group member, is '[name deleted]' which is the sacred *Tjukurrpa* name of [text deleted] — at [83].

- The genealogical evidence indicates a strong association with the northern and eastern regions of the application area. However, there are some ancestral connections to the western and southern regions of the claim area — at [66] and [69]. About half of the family groups that form the native title claim group are said to have ancestral links with core parts of the claim area, with the remaining having ancestral connection near the boundaries of the claim area — at [85].
- Dreaming tracks and locations, which the Dreaming beings created whilst travelling across Pilki lands, can be found in regions within each boundary of the application area and also in the central region — supplementary report at p. 7.

Current association of the native title claim group with the area

The factual basis material also contains facts in relation to the current association of the native title claim group, including facts pertaining to the asserted continuity of this association. Some of those facts are outlined above, but the following information is also relevant:

- The claimants are told stories about the application area, and also learn about the Tjukurrpa, how to look after country, how to speak their language and about their traditional customs from the older generations — the first affidavits of [name deleted] at [3], [8], [9], [13] and [15] and [name deleted] at [2], [7], [8], [16] and [22].
- The Pilki People do not live on Pilki country but in Tjuntjuntjara (just 15 km from the eastern boundary within the wider Pilki country) where there is an established community — connection report at [162]. There is no fresh water for an outstation to be established on Pilki country but only saltwater — the first affidavit of [name deleted] at [7]. About half of the claim group live within the Western Desert adjacent to the claim area — connection report at [325].
- A senior man was born in Mitutu, which is located near the northern boundary of the Pilki claim area — at [13]. Some other claim members were also born proximate to the northern boundary of the claim area and therefore their 'country' by birth includes the northern regions of the claim area — at [249].
- Claimants visit the open woodlands surrounding the vast lake system located in the central region of the claim area at least once a month to hunt — supplementary report at pp. 4 and 5. They hunt and gather turkeys, kangaroos, lizards and wichetty grubs — connection report at [17].
- Hunting tracks that the Pilki people use to travel through the claim area run across the northern, southern and western regions of the application area — supplementary report at p. 5. They travel through the application area for various reasons including for ceremonial trips, traditional burning and hunting — connection report at [285] and [286].

- The claim members are familiar with geographic formations in the claim area, including those made by the Tjukurrpa, and have knowledge of all the rock holes from the claim area to Laverton (some 350 km away) — at [18].
- Current members are said to have a continued association to country by continuing their traditions, having an active life in country and continue to learn and look after its religious aspects — at [281]. They frequently visit the claim area as part of hunting, gathering and wood collecting activities — supplementary report at p. 4.
- Photographic records show Pilki claimants in various locations within the application area — at pp. 9 to 13. Specifically, the claimants were photographed in areas within and proximate to the northern boundary and areas in the central-north regions of the claim area. The claimants are seen to be doing various activities including the cleaning of sites.
- Claim group members continue to follow traditional funeral customs — first affidavits of [name deleted] at [13] and [name deleted] at [17].
- The anthropological material indicates that traditional activities have continued throughout the application area from contact to the present — connection report at [335].

Consideration

[135] I consider that the factual basis material clearly identifies the native title claim group and acknowledges the relationship the Pilki people have with their country. The factual basis reflects the claim group members' knowledge of the boundaries of the wider Pilki country and locations within those boundaries, knowledge of the *Tjukurrpa* that formed the topography of the land and knowledge of various traditional practices such as initiation ceremonies, traditional burning and funeral rites.

[136] There is also, in my view, a factual basis that goes to showing the history of the association that members of the claim group have, and that their predecessors had, with the application area — see *Gudjala 2007* at [51]. Early explorers reported an Aboriginal presence on Pilki country around the early 1900s. They were observed to be living communally in camps, using camp fires and singing in their traditional language. The factual basis also indicates that some of the apical ancestors and their predecessors were born and lived in the wider Pilki country. For instance, an apical ancestor was born near the north-eastern boundary of the application area around the 1870s. Her daughter was also born there and her daughter's husband and his brother were born at [place name deleted] in the central region of the application area. The parents of the husband and his brother were born near the north-eastern boundary of the application area and their country was said to encompass the northern region of the claim area.

[137] The factual basis demonstrates that there was a continued occupation of the claim area until at least the late 1950s. In my view, the factual basis is sufficient to support the assertion that the Pilki people have remained in contact with the application area, though with some interruptions due to settlement in neighbouring regions and government intervention. Despite the interruptions, they have resided on or made use of the application area since contact. There is some material that points to Aboriginal people living in and around their country on a permanent basis and for longer durations. The flexible lifestyle in the missions allowed the Pilki people access to their homelands and to maintain their traditional customs and practices such as performing initiation ceremonies, traditional rituals and hunting and gathering practices. The

asserted facts suggest that the identified ancestors, their predecessors and their descendants for a substantial period, lived on or used the application area.

[138] In my view, the factual basis provides information that is sufficient to support the assertion that the ancestors were associated, both spiritually and physically, with the application area prior to European contact. It is also, in my view, sufficient to support the assertion that this association has been continued by their descendants through to the current members of the claim group. The factual basis demonstrates the intergenerational transfer of knowledge about the boundaries of Pilki country by telling stories about country, of the *Tjukurrpa*, their beliefs and their ancestors, and by showing sacred places and performing ceremonies and other traditional practices. This, in my view, reveals a continuing association with the area covered by the application. I consider that the factual basis is sufficient to support the assertion that there was and is a continued physical and spiritual connection to the application area. The Pilki people have hunted, gathered resources, camped and performed traditional burning in the area or nearby areas. Also of relevance is the continuity of Pilki participation in their traditional initiation ceremonies and funeral rites. The Pilki people also continue to acknowledge and observe their beliefs and practices regarding the spiritual dimension of their people and lands, their social systems of kinship, descent and marriage, and the relationship between families, individuals and wider groups of kin and their country — see my reasons at s. 190B(5)(b) below.

[139] The factual basis material predominately makes reference to areas near the northern and eastern boundaries of the application area. However, it also details travel over Pilki country along Dreaming tracks located throughout the country, visiting lakes for hunting and other activities being carried out by members of the native title claim group and their predecessors. The factual basis indicates that the Pilki people believe Dreaming tracks of the *Tjukurrpa* are present along each boundary that claimants travel along, which in my view allows for a broader connection, of a spiritual nature, to country. These beliefs and the continuance of traditional practices enable the Pilki people to maintain a physical as well as a spiritual connection to all their land and waters.

[140] From the above information, I consider that the factual basis is sufficient to support the assertion of an association, 'between the whole group and the area' — see *Gudjala 2007* at [52]. In my view, the factual basis material provides sufficient examples and facts with some geographical particularity to support the assertion of an association between the whole group and the whole area.

[141] On the basis of the information before me, I am **satisfied** that the factual basis provided is sufficient to support the assertion described by s. 190B(5)(a).

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

The requirements of s. 190B(5)(b)

[142] Section 190B(5)(b) is similarly worded to s. 223(1)(a) and, accordingly, I consider that it is necessary to apply s. 190B(5)(b) in light of the case law regarding the definition of 'native title rights and interests' found in s. 223(1)(a).

[143] In *Gudjala 2007*, Dowsett J observed that to satisfy s. 190B(5)(b):

> [t]here must be a factual basis sufficient to support the assertion that there exist traditional laws acknowledged by, and traditional customs observed by, the claim group, which laws and customs give rise to the Native Title claim. That factual basis must be capable of demonstrating that:
>
> - there are traditional laws and customs;
> - acknowledged or observed by the Native Title claim group; and
> - giving rise to the group's claim to Native Title rights and interests — at [62].

[144] His Honour was of the view that to be satisfied that there is a sufficient factual basis for this assertion, the facts must support the assertion of a traditional connection as explained by the High Court in *Yorta Yorta* — at [26].

[145] In light of *Yorta Yorta*, there must be a sufficient factual basis:

- to identify the pre-sovereignty society from which the claim group is descended;
- to support the assertion that the laws acknowledged and customs observed by the claim group derive from the pre-sovereignty society's normative system; and
- that those laws and customs have been passed down from generation to generation, without substantial interruption — at [37], [38], [42] to [50], [53], [54], [56] and [87].

[146] Dowsett J further commented that although 'apical ancestors are used only to define the claim group', the applicant 'at some point … must explain the link between the claim group and the claim area' and '[t]hat process will certainly involve the identification of some link between the apical ancestors and any society existing at sovereignty' — *Gudjala 2007* at [66].

Pilki traditional laws and customs

[147] The applicant's submissions contain general assertions in relation to the traditional laws and customs that give rise to the claimed native title, including:

> [m]embers of the Pilki claim group actively acknowledge the traditional laws, rituals and practices of Pilki country and in particular, those that give rise to rights and interests in the claim area. Laws and customs involving ceremonial 'business', looking after country as well as learning and understanding the *Tjukurrpa* are common practices of the claimants that give rise to strong rights and interests in the land — at [17].

[148] Further facts that support the assertion that there existed a pre-contact society from which the laws and customs of the native title claim group are derived can be found in the anthropological material — see also my consideration of the relevant society above. The information sets out the laws and customs that the Pilki people have knowledge of, and which they claim are derived from the laws and customs of the society that existed prior to European contact. The connection report provides details of how the laws and customs give rise to the native title rights and interests in the application area, which are set out in my reasons below.

[149] According to south Western Desert tradition, rights in country are activated by five (5) interactive traditional laws, namely:

- being born on country;
- being descended from a parent born or grandparent born on country;
- having physical association and knowledge of country;

- appropriate ritual status; and
- knowledge of the *Tjukurrpa* and its associated cultural geography — at [342].

[150] The first three (3) of these interactive traditional laws give a person utilitarian rights in country which encompasses the right to occupy, use and enjoy the land and waters of the claim area and participate in traditional activities such as hunting, gathering, extracting traditional materials and living on the land — at [343] and [344].

[151] The last two (2) traditional laws give authoritative rights in land which include the right to:

- share, exchange or trade resources of the land and waters;
- maintain and protect places and objects of significance on the land and waters;
- be consulted about any activity that may impact upon a place of significance to the native title claim group;
- conduct and participate in cultural, spiritual and traditional teaching activities;
- speak for the land and waters;
- make decisions about the use and enjoyment of the land and waters;
- control access to, and activities conducted by others on, the land and waters; and
- maintain and protect sites and objects of significance in the application area — at [345] and [346].

[152] According to their traditional laws and customs, the primary means by which Pilki people acquire, and are recognised to hold, rights in land is through birth — at [240]. The birth location will determine the territory to which a person is associated with and the totem the person will acquire — at [241] to [243].

[153] In the southern Western Desert, cognatic descent is another mechanism in which a person's association to country is recognised — at [258]. One of the claimants says that:

> [i]n our law, where you're born and your ancestors are from is important to where your country is. Now days when everyone is born in the hospital you have to look to your previous generations for the bush births — second affidavit of [name deleted] at [4].

[154] The Pilki people therefore recognise rights to land as a function of their father's country, father's father's country, mother's country, mother's father's country and mother's mother's country, referring to where their predecessors were born rather than where their country is — at [260] and [261]. Descent therefore gives rise to a family connection to country as family members who are descended from an apical ancestor associated with particular landholdings can demonstrate, and can be recognised as having, ancestral connection to that country. As this association to land depends on where a predecessor is born, each particular ancestral or cognatic landholding could shift with every passing generation meaning that there are temporal cycles of family connection to particular country — at [262]. These landholdings can be identified by particular sites and are associated with particular family groups. For instance, the [name deleted] or [name deleted] mob belong to the 'Pilki' area (located in the mid-eastern region of the claim area) and the [names deleted] mob are connected to the Palytju area (located proximate to the north-eastern boundary of the claim area). All the ancestral landholdings are adjoining and often

overlapping so that 'the claim area exists within an ancestral mosaic of association to country' — at [264]. Birth on country provides a closer connection to country than an ancestral connection, however, both could make the person a traditional right holder — at [265].

[155] An emotional or spiritual connection to country is said to be a legitimate mechanism for asserting rights. In contrast, ancestral connection to country without physical connection to or knowledge of that country would not express meaningful rights and interests in that country — at [271]. Adoption is also a legitimate means to acquire rights in country — at [266].

[156] Knowledge and association is another mechanism that one acquires rights to country. Historical records say that the Pilki ancestors, as well as other people from the southern Western Desert, were said to have grown up on country and thus knew their country and its resources — at [280]. Current members of the claim group are said to have continued this association to country by continuing their traditions, having an active life in country and by learning and looking after its religious aspect — at [281]; see also the affidavits of the claimants. This entitles current members who continue their traditions to express customary rights and interests in country with some authority — at [281]. Claim group members continue to travel through the application area for various reasons including for ceremonial trips, traditional burning, hunting and gathering resources — at [285] and [286].

[157] According to their traditional laws and customs, an increased use of and care for country results in increased authority, giving the individual status in the community and strengthening certain rights of association to land — at [281]. A person with closer association and knowledge of country will be afforded and will seek to exercise, greater utilitarian rights over country, particularly if they are descended from it and live near and travel within it — at [284]. Senior Pilki people are said to 'know the country' and so look after it until the younger generation with links to the area acquires the necessary knowledge to look after it — at [289]; see also first affidavit of [name deleted].

[158] The Pilki people also have a strong intellectual and political relationship between country and *Tjukurrpa* (or Dreamings), through which interests in land are defined and managed within the broader social context — at [291]. There are ten (10) *Tjukurrpa* that are asserted to be associated with the claim area — see further amended statement of claim at [19]. The *Tjukurrpa* are thought to be 'responsible for the existence and form of the landscape and rules by which people live and society is organized; and continue to be a presence or influence' — at [18].

[159] Knowledge of the *Tjukurrpa* is an essential determinant of the right to make decisions about land and about activities affecting land — connection report at [291]. Those learned in the *Tjukurrpa* can achieve prestige and political status within the community. When people talk about the *Tjukurrpa* in relation to sites and tracks, they are talking about all the social and political values and relationships of their society which those sites articulate. Thus, damaging a sacred site is more than damaging the physical character of the site, rather it is an attack on the intrinsic values of the society associated with that site — at [292]. The *Tjukurrpa* also explains the creation of physical attributes of the known universe and also provides justifications for the supernatural world, creating a basis from which the secular aspects of human experience can be understood in the context of the supernatural — at [293]. By damaging sacred stones at a *Tjukurrpa* site, a Pilki woman was said to have fallen sick from this event, which then resulted in her death — at [30].

[160] Knowledge about *Tjukurrpa* is either acquired in initiation or secret gender ceremonies or learnt though site visitation to discrete and secret gender restricted locations — at [301]. Gaining knowledge of the *Tjukurrpa*, namely its physical manifestations in country and its spiritual codes in society, and by undergoing the ritual initiation, training and other practices, is fundamental to the management of land, protection of places and areas from intruders, care for the sacred features in country and the recognition by others as capable of undertaking those responsibilities on behalf of one's community — at [302]. The factual basis provides details of certain men from Pilki families that have been initiated and therefore are recognised as 'fit' to hold land — at [300]. The material also indicates that one of the claimants and the children of another claimant have been initiated — at [305]; see also first affidavit of [name deleted] at [16].

[161] The Pilki people are also said to have a system of kinship in which an individual's social universe that determines who they are related to is defined through a relatively limited number of kin terms. The kin terms apply to a relatively large number of people who are deemed to be alike — further amended statement of claim at [20]. This kinship system determines the manner of behaviour on the basis of particular kin terms, accommodates systems of social classifications, maintains distinctions between socially defined groups on the basis of generation levels and recognises notions of closeness and distance — at [21] and [22].

[162] The laws and customs referred to above are asserted to be normative by reason of:

(a) commitment to the *Tjukurrpa* and fear of consequences of ignoring the tenets of *Tjukurrpa*, including fear of risking damaging both people and country;

(b) requirement of respect for elders and others with ritual status or authority; and

(c) fear of social and spiritual consequences of a breach of the laws and customs — at [29].

[163] The laws and customs of the Pilki people are asserted to be traditional because they have been 'passed from generation to generation', from the ancestors to current members of the claim group. The mode of transmission has usually been by word of mouth, demonstration and common practice from sovereignty to today — at [30] and [31]. The acknowledgement and observance of the laws and customs by members of the claim group and their predecessors has continued substantially uninterrupted since sovereignty — at [32]. In their affidavits, members of the claim group attest to being taught the traditional laws and customs by senior Pilki people, by being told stories and shown sites of significance and traditional practices. They acknowledge that learning all the traditional laws and customs is a long process. For instance, [name deleted] says that her aunt and grandmother, who is apical ancestor Tjiru, taught her the 'desert ways' — the first affidavit at [7]. The old people taught her 'about hunting and gathering, what tastes good, what tastes bad, how to know which is a good tree for bardi' — at [7]. She learnt about her home country and about the *Tjukurrpa* from one of the old people who told her the stories about her country and the Dreamtime stories — at [10] and [18]. She learnt how to look after country when she was growing up — at [21]. They would go camping and help clean the rockholes. She has seen the old people burn off the country when the grass is too high — at [21]. She, and other old people, now teach her sons about Pilki country and about the *Tjukurrpa* — at [16]. Her sons were taught traditional hunting and cooking by their father — at [22]. In addition, the supplementary report contains photographs of an older claim group member teaching younger claimants about the country in the central-north region of the claim area — at p. 10.

Comparison of the traditional system of laws and customs prior to European contact to the present

[164] The anthropological material indicates that Aboriginal people that occupied the Western Desert about 30,000 years ago followed a complex kin-sharing network — connection report at [94]. Archaeological evidence showed that the Western Desert people had a risk-minimising mode of adaptation which is similar to that followed in the present day — at [94]. Such evidence suggests a subsistence strategy, being highly nomadic, that is similar to people of the Western Desert today — at [95]. People in the southern Western Desert, would travel about 200 to 300 km from their descent group territory and back — at [97]. The archaeological evidence shows that travel through *Tjukurrpa* tracks accommodated the nomadic tradition — at [98].

[165] Prior to sustained European contact in the early 1900s, the anthropological and historical material indicate a continued presence of the Pilki people on Pilki country — at [100] to [101]. Traditional tracks were seen and were used to access water sources, and the Aboriginal people were observed to be camping, using fire and singing in the traditional language. Ancestor Tjiru is said to have spent most of her time walking and hunting in Pilki country — first affidavit of [name deleted] at [5]. During the mission period, the predecessors were observed to practice initiation ceremonies and other rituals, such as funeral rites. The ancestors and other predecessors also believed in and had knowledge of the *Tjukurrpa*. For instance, apical ancestor Ulan's brother was associated with the *Marlu* (Red Kangaroo) *Tjukurrpa* which runs through [place name deleted] (proximate to the northern boundary of the application area) — connection report at [56]. His daughter was married to an Aboriginal man who was associated with the Emu *Tjukurrpa* that came from [place name deleted] (near the north eastern boundary) — at [57]. Another predecessor, whose family had country around the eastern boundary within the wider Pilki area, was said to have died after damaging stones at a sacred site — at [30]. The stones are associated with the *Tjukurrpa* at [place name deleted], located in the central region of the application area. After damaging the stones, she became very sick and her death is attributed to supernatural causes — at [30].

[166] Current members of the claim group continue to regularly use and visit their country such as to travel through, visit sacred sites, hunt, gather and collect food and resources — supplementary report at pp. 4 and 5. They continue to believe in sacred locations and locations which are safe only for men and those that are safe only for women — at p. 3. The Pilki people have continued to believe in the *Tjukurrpa* and continue to participate in initiation ceremonies and follow various rituals. For instance, individuals who are uninformed of Pilki sacred country cannot visit those areas without following certain rituals which protect the country and make it safe for those persons to travel and visit — at pp. 1 and 2. They also continue to give their children bush names, for instance one of the current claim group members was given the bush name '[name deleted]', which is the sacred *Tjukurrpa* name of [text deleted] — connection report at [83]. Current members continue to speak in their traditional language and sing traditional songs during rituals — supplementary report at p. 3. They continue to look after the country such as by cleaning out rockholes and sacred sites or by traditional burning of the open grass plains. Claim group members also continue to follow traditional funeral customs — the first affidavits of [name deleted] at [13] and [name deleted] at [17].

[167] I note that the information extracted in my reasons for the relevant society and s. 190B(5)(a) are also relevant to my consideration of the assertion made under subsection (b).

Consideration

[168] In order to support the assertion that the relevant laws and customs are 'traditional' in the *Yorta Yorta* sense, I consider that the factual basis must include factual details of:

- the connection between the pre-sovereignty society and the existing claim group; and
- the connection between the laws and customs acknowledged and observed by the pre-sovereignty society and the existing claim group.

[169] I also consider that the factual basis must include assertions that do not merely restate the claim but provide an adequate general description of the factual basis — see *Gudjala 2007* at [62] and [66] and *Gudjala 2009* at [27] and [29].

[170] I consider, as mentioned above, the factual basis supports the assertion that some of the apical ancestors were born into the Pilki native title claim group of the 'Aluridja' or southern sub-region of the Western Desert society that existed at and prior to European contact — see *Gudjala 2009* at [55] and the connection report. I understand from the factual basis that the wider Pilki country, which includes the application area, is identified as where the southern sub-region of the Western Desert society exists — see my reasons for relevant society above. I consider that the factual basis demonstrates that some of the apical ancestors were born within the Pilki claim area or were born proximate to the Pilki claim boundaries where the pre-sovereignty society exists. I understand that the first European contact with the area occurred around the early 1900s and that apical ancestor Tjiru was born around the 1870s proximate to the north eastern boundary of the claim area. Historical records show the presence of Aboriginal people within the application area in the 1890s, and in the 1920s about 2,000 Aboriginal people were said to have occupied the application area prior to European contact. I am therefore of the view that the factual basis supports the assertion that at least some of the apical ancestors were born into the Pilki claim group of the southern sub-region of the Western Desert society that existed at and prior to European contact.

[171] The factual basis also demonstrates, in my view, that some of the apical ancestors and their descendants were associated with areas within the application area or wider Pilki country — see my reasons at s. 190B(5)(a) above. In my view, the material points to a continued association by the claim group with the application area, such as a continued belief in the *Tjukurrpa* and practice of traditional ceremonies and travelling, hunting and camping on the application area.

[172] In my view, the factual basis is also sufficient to support the assertion of a connection between a pre-sovereign society and the current native title claim group. The factual basis material contains genealogical evidence demonstrating clear links between some of those ancestors and current members of the claim group.

[173] I also consider that, overall, there does seem to be some information contained within the factual basis material from which the current laws and customs, acknowledged and observed, can be compared with those that are asserted to have existed prior to European contact. In my view, the Pilki people continue to acknowledge and observe a complex system of laws and customs that regulate access to land by the claim group members. The factual basis material also demonstrates the conferral of rights and obligations on claim group members, such as those with the appropriate knowledge having the responsibility to protect and clean sacred sites. For instance, one of the claimants speaks of learning about her country, how to look after it and about the

Tjukurrpa and now having the responsibility of looking after the country and passing the knowledge on to the younger generation — see first affidavit of [name deleted].

[174] I am also of the view that the Pilki people continue to acknowledge and observe the pre-sovereign system of landholding which defines a boundary of country on the basis that the person was born there or that country is where their father, father's father, mother, mother's father and mother's mother were born. Pilki native title rights and responsibilities in lands and waters were therefore passed down through birth or by adoption. In particular, Pilki persons are not only associated with the area they are born in, but also to the lands of their predecessors. The second component is said to identify ancestral or cognatic relations to land with cycles of family connection to country. Although the ancestral landholdings are flexible and the boundaries and the associated connection are changing with every generation, I am of the view, given the nomadic lifestyle of the Pilki people and their ancestors, that they identify particular family groups that have cognatic ties to certain regions within Pilki country. In my view, knowledge of this landholding system is held by members of the native title claim group and other Aboriginal groups, clearly acknowledging the connection and rights of specific people to certain places. Claim group members who are descended from an ancestor or predecessor can therefore demonstrate and be recognised as having ancestral connection to that country. For instance, the [names deleted] families are said to belong to the Pilki area located in the mid-eastern region of the claim area and the [names deleted] mob are connected to areas near the north-eastern region of Pilki country. Although birth on country provides a closer connection to country than would association by ancestral links, both could make a person a traditional right holder. The in-depth knowledge of this system that the claim group members display, in my view, is sufficient to support the assertion that they continue to acknowledge and observe it.

[175] In addition, I consider that the factual basis material demonstrates that the Pilki people maintain a physical and spiritual relationship with the land and waters. The Pilki people continue to believe in the *Tjukurrpa* and the associated cultural geography including belief in the Dreaming tracks, practice of traditional customs such as hunting, gathering and other rituals and ceremonies, and also belief in the supernatural such as falling sick from harming sacred sites.

[176] I understand from the factual basis material that it is asserted that knowledge of their traditional laws and customs and how one acquires rights to country including knowledge and understanding relating to the *Tjukurrpa* and links to ancestral landholdings, and to other traditional laws and customs, have been transmitted and continue to be transmitted by members of the Pilki people intergenerationally. Knowledge is passed on through modes of oral transmissions, such as being told stories and by being shown traditional practices and places of significance. The factual basis also demonstrates that the apical ancestors also practiced these modes of teachings — see first affidavit of [name deleted] where she refers to learning from her grandmother, ancestor Tjiru. It follows that, in my view, the factual basis is sufficient to support the assertion that the laws and customs currently observed and acknowledged are 'traditional' in the *Yorta Yorta* sense as the information is sufficient to support the assertion that those laws and customs derive from a society that existed prior to European contact of the area.

[177] I am also of the view that the factual basis is sufficient to support the assertion that the relevant laws and customs of the society at pre-contact, have been passed down through the generations to the current claim group, and have been acknowledged and observed by them without substantial interruption. This continuous pattern of teaching that ensures the younger

generations are equipped with the knowledge, in my opinion is sufficient to support the assertion that these laws and customs will continue to be passed to future generations ensuring a vitality and continuity of the traditional laws and customs.

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

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

[179] In *Martin*, French J held that:

> [u]nder s. 190B(5)(c) the delegate had to be satisfied that there was a factual basis supporting the assertion that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs. This is plainly a reference to the traditional laws and customs which answer the description set out in par (b) of s. 190B(5) —at [29].

[180] Accordingly, meeting the requirements of this condition relies on whether there is a sufficient factual basis to support the assertion at s. 190B(5)(b) that there exist traditional laws and customs which give rise to the claimed native title rights and interests.

[181] This condition is also concerned with whether the factual basis is sufficient to support the assertion that the native title claim group has continued to hold the native title rights and interests claimed. In my view, this assertion relates to the continued holding of native title through the continued observance of the traditional laws and customs of the group.

[182] In addressing this aspect of the test, in *Gudjala 2009*, Dowsett J considered that where the claimant's factual basis relied upon the drawing of inferences, that:

> [c]lear evidence of a pre-sovereignty society and its laws and customs, of genealogical links between that society and the claim group, and an apparent similarity of laws and customs may justify an inference of continuity'— at [33].

Consideration

[183] The applicant's submissions provides the following general assertion:

> [t]he Pilki claim group continue to hold native title in accordance with traditional laws and customs. In particular, members of the claim group continue to hold knowledge of the *Tjukurrpa* as it affects the claim area, including with respect to stories, songs and dances. It is apparent that the native title claim group are aware of these laws through inter-generational transfer and they are continuing to impart this knowledge onto their children and the younger generations — at [21].

[184] There is, in my view, information within the factual basis material that goes to explaining the transmission and continuity of the native title rights and interests held in the application area in accordance with relevant traditional laws and customs. This is particularly evident in the claimants' affidavits.

[185] [Name deleted] says that every year they travel through Pilki and the old men tell stories about the place — first affidavit at [8]. He says that the old Spinifex men hold the *Tjukurrpa* for Pilki and that he is still learning the *Tjukurrpa*, about his country and the traditional law — at [9] and [15].

[186] [Name deleted] attests to speaking Pitjantjatjara language (language spoken in the southern Western Desert) which she learnt from the old people when she was growing up and all her sons

also speak that language — her first affidavit at [2]. Her aunty and grandmother (ancestor Tjiru) raised her and taught her the 'desert ways' — at [7]. The old people taught her 'about hunting and gathering, what tastes good and what tastes bad, how to know which is a good tree for bardi' — at [7]. She grew up at a mission to the south-east of the claim area with other Pilki people where they continued the traditional ways such as performing ceremonies — at [8]. While growing up, she learnt about her country from a senior man who would tell her stories about it and how he would travel there with her parents and grandmother — at [10]. She says that she is now able to look after country and learnt how to do so while growing up such as by cleaning out rockholes when they went camping — at [21]. She says that her sons are initiated men and are learning about Pilki country and about the *Tjukurrpa* from her and other Pilki people — at [16]. Her sons were taught by their father the proper way to hunt and cook— at [22].

In forming my decision in relation to this requirement, I have also considered my reasons above in relation to the relevant pre-sovereign society and s. 190B(5)(b), and in particular that:

- the relevant pre-sovereignty society has been clearly identified and some facts in relation to that society have been set out;
- there is some information pertaining to the acknowledgement and observance of laws and customs by previous generations of Pilki people in relation to the application area;
- examples of the claim group's current acknowledgement and observance of laws and customs in relation to the application area have been provided.

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

[188] The application **satisfies** the condition of s. 190B(5) because the factual basis provided is **sufficient** to support each of the particularised assertions in s. 190B(5).

Subsection 190B(6)
Prima facie case

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

[189] The claimed native title right and interest that I consider can be prima facie established is identified in my reasons below.

The requirements of s. 190B(6)

[190] The requirements of this section are concerned with whether the native title rights and interests, identified and claimed in this application, can be *prima facie* established. Thus, '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' — *Doepel* at [135]. Nonetheless, it does involve some 'measure' and 'weighing' of the factual basis and imposes 'a more onerous test to be applied to the individual rights and interests claimed' — at [126], [127] and [132].

[191] I note that this section is one that permits consideration of material that is beyond the parameters of the application — at [16].

[192] In *Gudjala 2007*, Dowsett J noted that the requirements of s. 190B(6) are to be considered in light of the definition of 'native title rights and interests' at s. 223(1) — at [85]. His Honour further noted the observations of the High Court in *Yorta Yorta* that the claimed native title rights and interests:

> must nonetheless be rights and interests possessed under the traditional laws acknowledged and the traditional customs observed by the peoples in question. Further, the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs. For the reasons given earlier, "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — *Yorta Yorta* at [86], cited in *Gudjala 2007* at [86].

[193] I must, therefore, consider whether, prima facie, the individual rights and interests claimed:

- exist under traditional law and custom in relation to any of the land or waters in the application area;
- are native title rights and interests in relation to land or waters; and
- have not been extinguished over the whole of the application area.

[194] The 'critical threshold question' for recognition of a native title right or interest under the Act 'is whether it is a right or interest "in relation to" land or waters' — *Western Australia v Ward* [2002] HCA 28 (*Ward HC*) per Kirby J at [577]. His Honour noted that the phrase 'in relation to' is 'obviously very broad'. That phrase was also considered by the Full Federal Court stating '[t]hat the words 'in relation to 'are of wide import' — *Northern Territory of Australia v Alyawarr, Kaytetye, Wurumunga, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [93].

[195] Having examined the native title rights and interests set out in the orders and determinations sought at [3] to [6] and the further amended statement of claims at [5] to [43], I am of the opinion that they are, prima facie, rights or interests 'in relation to land or waters.'

[196] As to the other requirements for native title rights and interests, this was put succinctly by the majority in *Yorta Yorta* (referring primarily to s. 223(1)(c) but alluding to the requirements of s. 223(1)(a)):

> [n]ative title *owes its existence and incidents to traditional laws and customs*, not the common law. The role of the common law is limited to the recognition and protection of native title. That recognition and protection *depends on native title not having been extinguished* and its not having incidents that are repugnant to the common law. Thus … s 223(1)(c) "requires examination of whether the common law is inconsistent with the continued existence of the rights and interests that owe their origin to Aboriginal law or custom" [emphasis added] — at [110].

[197] Further, whilst the exercise of native title rights and interests 'may constitute powerful evidence' of both the existence and content of those rights and interests, the statutory scheme (including s. 223(1)(a)) is directed towards their possession, not their exercise, pursuant to the traditional laws and customs. The 'continuity of the chain of possession' may also be relevant — *Yorta Yorta* at [84] to [85].

[198] I consider that the further amended statement of claim and Schedule L of the application sufficiently addresses any issue of extinguishment, for the purpose of the test at s. 190B(6).

[199] Before I consider the rights and interests claimed, I note that my reasons at s. 190B(6) should be considered in conjunction, and in addition to, my reasons and the material outlined at s. 190B(5).

Native title rights and interests claimed

[200] The rights and interests being claimed are identified in my reasons at s. 190B(4) above.

[201] In my view, the description indicates that the native title claim group has made a claim for exclusive possession over the application area — applicant's submissions at [24] and [26], orders and determination sought at [3] and further amended statement of claim at [37].

[202] The majority of the High Court in *Ward HC* considered that '[t]he expression "possession, occupation, use and enjoyment … to the exclusion of all others" is a composite expression directed to describing a particular measure of *control over access to land*' [emphasis added] — at [89]. Further, that expression, collectively, conveys 'the assertion of rights of control over the land', which necessarily flow 'from that aspect of the relationship with land which is encapsulated in the assertion of a right to speak for country' — at [93].

[203] In *Griffiths v Northern Territory of Australia* [2007] FCAFC 178, the Full Court explored the relevant requirements to proving that such exclusive rights are vested in a native title claim group, stating:

> the question whether the native title rights of a given native title claim group include the right to exclude others from the land the subject of their application does not depend upon any formal classification of such rights as usufructuary or proprietary. *It depends rather on the consideration of what the evidence discloses about their content under traditional law and custom* [emphasis added] — at [71].

[204] The Full Court was of the view that control of access to country could flow from 'spiritual necessity', due to the harm that would be inflicted upon those that entered country unauthorised — at [127]. Further, the Full Court commented that it is also 'important to bear in mind that traditional law and custom, so far as it bore upon relationships with persons outside the relevant community at the time of sovereignty, would have been framed by reference to relations with indigenous people' — at [127].

Consideration

[205] In examining whether the claimants' material prima facie establishes its existence, I consider that this right materialises from traditional laws and customs that permit the native title claim group to exhibit control over all others in relation to access to the land and waters.

[206] The factual basis material reflects that:

- there has been a continuous existence, acknowledgement and observance of laws and customs of the relevant society of the ownership of country and its resources;
- current members of the Pilki people maintain an extensive knowledge of their country and entitlements; and
- the Pilki people, in relation to their territory, have an entitlement to exclude for wrongful presence or use of land and waters.

[207] The factual basis is such that it is asserted that at the time of European contact with the area there existed an association between the Pilki people and its land and waters.

[208] I understand claim group members speak of Pilki country as being home when they or a parent or grandparent is born in that place, if they have knowledge of the country, have knowledge of how to live in the country and are informed about the *Tjukurrpa* for the country. They say that permission must be sought from the 'old men' to enter Pilki country and that a person must know the country and look after it in order to speak for it — the first affidavits of [name deleted] at [14] and [15] and [name deleted] at [23], [24] and [26]. To have knowledge of country or to be able to speak for it, a person must be born on it or that country must be where their father, father's father, mother, mother's mother or mother's father was born. Pilki native title rights and responsibilities in lands and waters were passed down through birth or by adoption. By continuing to acknowledge and observe this traditional system of landholding, claim group members who are descended from an ancestor or predecessor are able to demonstrate and be recognised as having ancestral connection to that country. For instance, the [names deleted] families are said to belong to the Pilki area located in the central region of the claim area and the [names deleted] mob are connected to areas near the north-eastern boundary of Pilki country — see also my reasons at s. 190B(5)(b) above.

[209] The supplementary report provides that only people who are spiritually inducted and have observed the process of ritual instruction can visit sacred Pilki country — at p. 1. Outsiders must follow certain traditional practices in order to be introduced to each area and for any antagonistic spiritual elements at the particular site to be pacified — at p. 2. Sacred sites are protected by certain senior Pilki people, who act as 'gatekeepers' for those sites and perform various rituals to protect it — at pp. 2 and 3. This form of control and exclusion is said to protect country from harm and from country harming people — at p. 4. The consequences of infringement may result in sickness or death — at p. 4.

[210] The connection report demonstrates Pilki belief in the supernatural forces and refers to events that are said to have been caused by the supernatural. For instance, a Pilki woman is believed to have fallen sick after damaging stones at a *Tjukurrpa* site which led to her death — at [30].

[211] It is my view of the factual basis material that current members of the native title claim group maintain an extensive knowledge of their country. The knowledge of the laws and customs of the current members elicits that other people should seek permission to access their ancestral country. Such control also flows from 'spiritual necessity' to protect country from harm and from country harming people. The persons who are informed about country and have an association with country through birth or cognatic ties are able to own country. This symbolic ownership encompasses the right to speak for country and the right to exclude.

[212] As this right is said to have been derived from Pilki ancestors and has been transmitted through the generations, I consider that this right is prima facie traditionally based.

[213] It is my view that this exclusive right is prima facie established.

[214] The application **satisfies** the condition of s. 190B(6).

Subsection 190B(7)
Traditional physical connection

> The Registrar must be satisfied that at least one member of the native title claim group:
> (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application, or
> (b) previously had and would reasonably be expected to currently have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:
> (i) the Crown in any capacity, or
> (ii) a statutory authority of the Crown in any capacity, or
> (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease.

[215] The High Court's decision in *Yorta Yorta* and the Federal Court's decision in *Gudjala 2009* are of primary relevance in interpreting the requirements of s. 190B(7). In the latter case, Dowsett J observed that it 'seems likely that [the traditional physical] connection must be in exercise of a right or interest in land or waters held pursuant to traditional laws and customs' — at [84]. In interpreting connection in the 'traditional' sense as required by s. 223 of the Act, the members of the joint judgment in *Yorta Yorta* felt that:

> the connection which the peoples concerned have with the land or waters must be shown to be a connection by their traditional laws and customs … "traditional" in this context must be understood to refer to the body of law and customs acknowledged and observed by the ancestors of the claimants at the time of sovereignty — at [86].

[216] I consider that for the purposes of s. 190B(7), I must be satisfied of a particular fact or facts, from the material provided, that at least one member of the claim group has or had the necessary traditional *physical* association with the application area — *Doepel* at [18].

[217] I refer to the information above in relation to s. 190B(5) of these reasons, which provide a sufficient factual basis supporting the assertion that the Pilki people acknowledge and observe the traditional laws and customs of the pre-contact society.

[218] I note that the connection report contains relevant information that describe a traditional physical association of the Pilki people with the application area, including that they freely hunt and gather turkeys, kangaroos, lizards and witchetty grubs and actively burn the open grass plains — at [17].

[219] I also consider that the affidavits of [name deleted] and [name deleted] contain relevant information for the purposes of s. 190B(7). In particular:

> My father … was born in the bush in the Pilki claim area. …
>
> My [grandfather] was born in the bush in the Pilki area too. He told us stories about walking around that place from rockhole to rockhole with the other older people.
>
> … [M]y father took me round that country including the Pilki area.
>
> … Even today there's lots of travel between Coonana and Tjuntjuntjara communities through the Pilki area. We haven't lost touch with our homelands and I'm always there for business, funerals and whenever the old men tell me.

> … We go every year, travel through Pilki, from Illkurika up to Neales Junction and the old Spinifex men tell us stories about that place. …
>
> I've been hunting since I was a little boy with my father. We hunt around … Tjuntjuntjara and Pilki. The fat marlu's the best one but you gotta cook him and share him out by the proper law. We also get [goanna], [blue-grey kangaroo], [emu] and [turkey].
>
> Maybe once a year, my wife and kids and I go camping out Pilki way and they collect bushtucker like [witchetty grub], quandong, [silky pear], [sticky lolly]. We also make sure rockholes are clean like the old people tell us — first affidavit of [name deleted] at [3] to [6], [8], [10] and [11].

[220] Given the above, and considering all of the information provided with the application, I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with the land or waters within the application area.

[221] The application **satisfies** the condition of s. 190B(7).

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

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

Section 61A provides:

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

(2) If :

(a) a previous exclusive possession act (see s. 23B) was done, and

(b) either:

  (i) the act was an act attributable to the Commonwealth, or

  (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23E in relation to the act;

a claimant application must not be made that covers any of the area.

(3) If:

(a) a previous non-exclusive possession act (see s. 23F) was done, and

(b) either:

  (i) the act was an act attributable to the Commonwealth, or

  (ii) the act was attributable to a state or territory and a law of the state or territory has made provisions as mentioned in s. 23I in relation to the act;

a claimant application must not be made in which any of the native title rights and interests confer possession, occupation, use and enjoyment of any of the area to the exclusion of all others.

(4) However, subsection(2) and (3) does not apply if:

(a) the only previous non-exclusive possession act was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded were the application to be made, and

(b) the application states that ss. 47, 47A or 47B, as the case may be, applies to it.

[222] In the reasons below, I look at each part of s. 61A against what is contained in the application and accompanying documents and in any other information before me as to whether the application should not have been made.

Reasons for s. 61A(1)

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

[224] The geospatial assessment states that no determinations of native title fall within the external boundaries of the application area. The results of my own search of the Tribunal's mapping database confirm that there is no overlap with any native title determination. It follows that the application is not made in relation to an area for which there is an approved determination of native title.

[225] In my view the application **does not** offend the provisions of s. 61A(1).

Reasons for s. 61A(2)

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

[227] Part 3 of Attachment B states that:

> [f]or the purposes of the application of sections 61A(4) and 47B of the Act, the application covers the entirety of the vacant Crown land, as identified in the map at Attachment C, which is subject to section 47B. See Orders and Determination Sought Schedule 5.

[228] Schedule 5 of the orders and determination sought identifies eight (8) pastoral leases to which s. 47B of the Act applies.

[229] In *Doepel*, Mansfield J was of the view that it was not incumbent on the Registrar to resolve issues of fact or law as to whether ss. 47, 47A or 47B may apply so as to require any extinguishment by a previous exclusive possession act to be disregarded when considering whether the application meets the requirements of s. 190B(8) — at [135].

[230] I note that s. 61A(4) specifically provides that an application may be made in circumstances where the application states that that provision applies to any known previous exclusive possession act.

[231] In my view the application **does not** offend the provisions of s. 61A(2).

Reasons for s. 61A(3)

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

[233] I am satisfied that the application does not claim native title rights and interests that confer possession, occupation, use and enjoyment to the exclusion of all others in an area that is, or has been, subject of a previous non-exclusive possession act, except to the extent that ss. 47, 47A or

47B of the Act may apply — see Attachment B, Schedule L and orders and determination sought at [9] and Schedule 5.

[234] In my view, the application **does not** offend the provisions of s. 61A(3).

Conclusion

[235] In my view the application **does not** offend any of the provisions of ss. 61A(1), (2) and (3) and therefore the application **satisfies** the condition of s. 190B(8).

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

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

[236] I consider each of the subconditions of s. 190B(9) in my reasons below.

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

[237] Schedule Q provides that the applicant makes no claim to any mineral, petroleum or gas wholly owned by the Crown in rights of the Commonwealth or State.

[238] The application **satisfies** the subcondition of s. 190B(9)(a).

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

[239] Schedule P indicates that no offshore places comprise part of the area covered by the application.

[240] The application **satisfies** the subcondition of s. 190B(9)(b).

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

[241] The application provides details of areas where extinguishment of native title is required by s. 47B to be disregarded — see Attachment B, Schedule L and Schedule 5 of the orders and determination sought.

Conclusion

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

[End of reasons]

Attachment A

Information to be included on the Register of Native Title Claims

Application name	Pilki People
NNTT file no.	WC2002/003
Federal Court of Australia file no.	WAD6002/2002

In accordance with ss. 190(1) and 186 of the *Native Title Act 1993* (Cwlth), the following is to be entered on the Register of Native Title Claims for the above application.

Section 186(1): Mandatory information

Application filed/lodged with:

Federal Court of Australia

Date application filed/lodged:

12 August 2002

Date application entered on Register:

18 April 2005

Applicant:

Victor Willis, [Name withheld for cultural reasons], Daniel (Stevie) Sinclair and Betty Kennedy

Applicant's address for service:

As appears on the extract from the Schedule of Native Title Applications

Area covered by application:

As appears on the extract from the Schedule of Native Title Applications

Persons claiming to hold native title:

Native title holders (s 225(a))

2. The native title is held by the persons described in Schedule 2 **(native title holders)**.

Schedule 2 – Native Title Holders

The persons referred to in Order 2 are:

(1) The Pilki Native Title Holders are persons who:

(a) have rights in part or all of the Determination Area through: descent from an ancestor born within the area; conception and/or being born within the area; having ritual authority to make decisions about religious locations and land within the area; and

(b) are recognised under their traditional laws and customs by other Pilki native title holders as having rights in the Determination Area.

(2) At the date of this Determination the persons referred to in (1) includes the following:

(a) the descendants of the following people:

- Tjiru (Kennedy family)
- Tarrpi (Willis family)
- Ulan (West family)
- Palapala (Barton family)
- Wiltjawarra (Sinclair, Gordon family links with Scott, Felton, Willis)
- Ngunimpi (Scott, Winter and Hogan family)
- Nganawarra (Scott family)
- Utjil (Graham family)
- Kukukuku (Scott family)
- Nakarra (Scott family – links to Brown, Macarthur, Laidlaw)
- Pipin (Stokes, Forrest, Tucker, Wesley, McCarthy family)
- Ninakata (Bilsen family)
- Kuruyilinya (Macathur, Laidlaw family)
- Angkatji (Currie family)
- Minimimpi (Dimer family)
- Jimmy Kangaroo (Flynn family)
- Dean and Ruby (Walker and Nudding family)
- Tjartjanya and Iame Charlie (Carmody and Edwards family)
- Lily, Hedley and Robbie (Robinson/Franks family)
- Felton (Rice, Anderson family)
- Wimpana (Lynch family)
- Nunayi (Ridley family); and
- Ruby and Adana (Dodd family)

(b) the following people:

- Roy Underwood
- Ned Grant
- Fred Grant
- Mark Anderson (already listed spouse in Felton/Rice family)
- Lawrence Pennington (spouse in Felton/Rice family)
- Leonard Walker
- Ian Rictor
- Debbie Hansen
- Elaine Thomas
- Angelina Woods

Temporary Note – The list of people in 2(b) will need to be finalised immediately prior to the determination being made.

Registered native title rights and interests:

The nature and extent of native title rights and interests (s225(b); s 225(e))

3. Subject to Orders 4, 5 and 6 the nature and extent of the native title rights and interests is the right of possession, occupation, use and enjoyment as against the whole world.

Qualifications on native title rights and interests (s225(b); s 225(e))

4. The native title rights and interests are exercisable in accordance with, and subject to, the:

(a) traditional laws and customs of the native title holders; and

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

5. For the avoidance of doubt the nature and extent of native title rights and interests in relation to water in any watercourse, wetland or underground water source as defined in the *Rights in Water and Irrigation Act 1914* (WA) as at the date of this determination is the non-exclusive right to take, use and enjoy that water.

6. Notwithstanding anything in this determination, there are no native title rights and interests in the Determination Area, in or in relation to:

(a) minerals as defined in the *Mining Act 1904* (WA) (repealed) and the *Mining Act 1978* (WA); or

(b) petroleum as defined in the *Petroleum Act 1936* (WA) (repealed) and in the *Petroleum and Geothermal Resources Energy Act 1967* (WA); or

(c) geothermal energy resources and geothermal energy as defined in the *Petroleum and Geothermal Energy Resources Act 1967* (WA).

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