

# Registration test decision

Application name	Bar Barrum People #9
Name of applicant	Michael James Congoo, Shelton Murphy, Andrew Timothy Congoo, Warren Congoo (applicant)
Application made	25 November 2015
Application amended	20 October 2015
Federal Court No.	QUD1076/2015

My decision under s 190A of the *Native Title Act 1993* (Cth)<sup>1</sup> is that the claim in the Bar Barrum People #9 application satisfies all of the conditions in ss 190B and 190C of the Act. It follows that the claim must be accepted for registration<sup>2</sup> and entered on the Register of Native Title Claims.<sup>3</sup>

**Date of decision:** 25 May 2016

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Susan Walsh, Practice Manager<sup>4</sup>

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<sup>1</sup> All legislative sections are from the *Native Title Act 1993* (Cth) (the Act), unless I state otherwise.

<sup>2</sup> See s 190A(6) of the Act.

<sup>3</sup> See s 190(1) of the Act.

<sup>4</sup> Delegate of the Native Title Registrar under a written delegation dated 20 November 2015 pursuant to s 99 of the Act.

## *Introduction*

[1] The application is made on behalf of the Bar Barrum People native title claim group in relation to the land and waters covered by a leasehold interest in the rural country around Mutchilba, which is west of Cairns in Far North Queensland. The Deputy Registrar of the Federal Court gave a copy of the amended application and accompanying affidavits filed in the Court to the Native Title Registrar (Registrar) on 25 November 2015. This has triggered the duty to consider the claim in the amended application against the registration test conditions set out in ss 190B and 190C.<sup>5</sup> If the claim satisfies all of the conditions, then the Registrar must accept the claim for registration.<sup>6</sup> If the claim does not satisfy all of the conditions, the Registrar must not accept the claim for registration.<sup>7</sup> My decision is that the claim satisfies all of the registration test conditions and my reasons against each condition now follow.

## *Conditions about the merits of the claim: s 190B(1)*

### **Decision on identification of area subject to native title: s 190B(2)**

[2] The claim meets the requirements of s 190B(2) as I am satisfied that the written description and the map of the external boundary and the written description of internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters covered by the application. My reasons now follow.

#### *What is needed to meet s 190B(2)?*

[3] To meet s 190B(2), the Registrar ‘must be satisfied that the information and map contained in the application ... are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters.’ The two questions for this condition are whether the information and map provides certainty about: (a) the external boundary of the area of land or waters over which native title rights and interests are claimed; and (b) any areas within that external boundary over which native title rights and interests are not claimed.<sup>8</sup>

#### *Does the information provided about the external boundary meet this condition?*

[4] Schedule B of the application states that the ‘area covered by the application comprises all the land and waters within Lot 301 on Crown Plan HG843491’. Attachment C to the application contains a map prepared by the Tribunal’s geospatial services, with the application area outlined in blue ink. The map contains a topographic background, scale bar, coordinate grid and locality

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<sup>5</sup> See s 190A(1).

<sup>6</sup> See s 190A(6). I note that s 190A(6A) does not apply as the claim in the application made on 18 June 2015 has not previously been accepted for registration nor entered on the Register of Native Title Claims.

<sup>7</sup> See s 190A(6B).

<sup>8</sup> See Mansfield J in *Northern Territory v Doepel* (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 (*Northern Territory v Doepel*) at [122].

map. There are also notes for the source, currency and datum of data use to prepare the map. The Tribunal's Geospatial mapping division expresses the expert view that the written description and map are consistent and identify the application area with reasonable certainty.<sup>9</sup>

[5] I find that the written description and map are sufficiently comprehensive, detailed and consistent to identify the external boundary on the earth's surface with a reasonable degree of certainty. This information establishes that native title rights and interests are claimed over the lands and waters within the boundary of a known land parcel that is in turn catalogued and identified within the State of Queensland's cadastral land system Lot 301 on Crown Plan HG843491. The external boundary of Lot 30 is shown with clarity on the map in Attachment C.

[6] I find that the written description and the map are comprehensive, detailed and consistent. Armed with this information, the external boundaries of the area can be located on the earth's surface with a reasonable degree of certainty. Accordingly, the information satisfies the requirements of s 190B(2) insofar as the external boundary is concerned.

***Does the information about excluded areas within the external boundary meet this condition?***

[7] Schedule B of the application contains a written description of areas within the external boundary that are not covered by the application. This states that any areas within the external boundary affected by a range of acts known as 'previous exclusive possession acts',<sup>10</sup> are excluded from the application area, save where such extinguishment is to be disregarded as a result of the operation of certain provisions in the Act.<sup>11</sup> Schedule B excludes any areas where native title rights and interests have otherwise been extinguished.

[8] I find that the written description of the internally excluded areas is reasonably clear. It will be possible to work out any internally excluded areas affected by a previous exclusive possession act or other extinguishment, once a search of historical and current tenure for the application area is completed.<sup>12</sup>

**Decision on identification of native title claim groups: s 190B(3)**

[9] The claim meets the requirements of s 190B(3) as I am satisfied that the application contains a sufficiently clear description of the persons in the native title claim group, so that it can be ascertained whether any particular person is in that group. My reasons now follow.

***What is needed to meet s 190B(3)?***

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<sup>9</sup> See Tribunal Geospatial report dated 7 December 2015.

<sup>10</sup> See s 23B.

<sup>11</sup> See ss 47, 47A or 47B.

<sup>12</sup> This approach is supported by the decisions in *Daniel for the Ngaluma People & Monadee for the Injibandi People v Western Australia* [1999] FCA 686 (Nicholson J) and *Strickland v Native Title Registrar* (1999) 168 ALR 242; [1999] FCA 1530 at [51] to [52] (French J, as the Honourable Chief Justice then was).

[10] To meet s 190B(3), the Registrar ‘must be satisfied that: (a) the persons in the native title claim group are named in the application; or (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.’ The only question for this condition is ‘whether the application enables the reliable identification of persons in the native title claim group.’<sup>13</sup> Whether the claim is on behalf of the correct native title claim group is not relevant.<sup>14</sup>

***Does the description of the persons in the native title claim group meet this condition?***

[11] Schedule A of the application does not name all of the persons in the claim group in the manner identified by subsection (a). The question is therefore whether the description of the native title claim group in Schedule A satisfies subsection (b). Schedule A of the application states that the Bar Barrum native title claim group is comprised of the biological and adopted (in accordance with traditional law and custom) descendants of the apical ancestors named in Schedule A. In some cases a single person is named and in others, two are named. In some cases, an apical ancestor is described by reference to the children born to that ancestor.

[12] I interpret the description to mean that a person may be ascertained as a member of the claim group if they can show biological or adoptive descent from one or more of the Bar Barrum ancestors. It has long been accepted that a criterion of descent from named apical ancestors provides a ‘substantial factual element’<sup>15</sup> and a clear basis for a ‘factual inquiry’<sup>16</sup> such that a person’s status as a member of the claim group is capable of being ascertained with a sufficient degree of clarity. The apical ancestors have all been described by name. This provides an objective starting point for an inquiry as to whether a person is a descendant of one or more of the named ancestors and thus a member of the native title claim group

**Decision on identification of claimed native title: s 190B(4)**

[13] The claim meets the requirements of s 190B(4) as I am satisfied that the description in the application is sufficient for me to clearly understand and identify the rights as native title rights and interests, as defined in s 223(1). My reasons now follow.

***What is needed to meet s 190B(4)?***

[14] To meet s 190B(4), the Registrar ‘must be satisfied that the description contained in the application as required by paragraph 62(2)(d) is sufficient to allow the claimed native title rights and interests to be readily identified’. The question for this condition is whether the claimed rights are described clearly, comprehensively and in a way that is meaningful and

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<sup>13</sup> *Northern Territory v Doepel* at [51] and also at [37].

<sup>14</sup> *Northern Territory v Doepel* at [37] and the decision of Dowsett J in *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167 (*Gudjala 2007*), that this condition ‘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].

<sup>15</sup> *Ward v Registrar, National Native Title Tribunal* (1999) 168 ALR 242; [1999] FCA 1732 at [27] (Carr J).

<sup>16</sup> *Western Australia v Native Title Registrar* (1999) 95 FCR 93; [1999] FCA 1591 at [63] to [69] (Carr J).

understandable, having regard to the definition of the term 'native title rights and interests' in s 223 of the Act.<sup>17</sup>

***Does the description of the native title rights and interests meet this condition?***

[15] Schedule E of the application states that the native title rights and interests claimed are:

- (a) In relation to land where there is no prior extinguishment of native title or where the non-extinguishment principle applies, the claim is to the exclusive rights to possession, occupation, use and enjoyment of the area as against the whole world;
- (b) In relation to remaining lands and waters, the claim is to a series of non-exclusive rights relating to access and use of the area and its resources.

[16] This description is carefully drafted and clearly explains the identified native title rights and interests. The description is sufficient for me to clearly understand and identify the itemised rights as 'native title rights and interests'.

**Decision on factual basis for claimed native title: s 190B(5)**

[17] The claim meets the requirements of s 190B(5) as I am satisfied that the factual basis on which it is asserted that the claimed native title rights and interests exist is sufficient to support the assertion and the three particular assertions in s 190B(5). My reasons now follow.

***What is needed to meet s 190B(5)?***

[18] To meet s 190B(5), the Registrar 'must be satisfied that the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion.' Section 190B(5) then states that the factual basis must support three particular assertions:

- (a) an association by the claim group and their predecessors with the area;
- (b) the existence of traditional laws and customs acknowledged and observed by the native title claim group giving rise to the claimed native title; and
- (c) the claim group continuing to hold the native title under those traditional laws and customs.<sup>18</sup>

[19] Answering the questions posed by s 190B(5) does not involve a hearing by the Registrar of the Bar Barrum People's claim to hold native title in relation to the area covered by the application. At the end of the day, whether or not the Bar Barrum People hold native title is for the Federal Court to hear and determine.

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<sup>17</sup> *Northern Territory v Doepel* at [99] and [123].

<sup>18</sup> See the particular assertions set out in subsections (a), (b) and (c).

[20] That the Registrar's consideration of the claim against this condition is limited is supported by the case law. After generally considering the provisions of ss 190B and 190C, Mansfield J held in *Northern Territory v Doepel* that:

It is trite to observe that the nature of the Tribunal's task is defined by those provisions. Its task is clearly not one of finding in all respects the real facts on the balance of probabilities, or on some other basis. Its role is not to supplant the role of the Court when adjudicating upon the application for determination of native title, or generally to undertake a preliminary hearing of the application.<sup>19</sup>

[21] Mansfield J went on to find that the task for the condition of s 190B(5) is to 'address the quality of the asserted factual basis for those claimed rights and interests; but only in the sense of ensuring that, if they are true, they can support the existence of those claimed rights and interests'.<sup>20</sup> Mansfield J also said that it is not for the Registrar to 'test whether the asserted facts will or may be proved at the hearing, or to assess the strength of the evidence which may ultimately be adduced to establish the asserted facts'.<sup>21</sup>

[22] A Full Court of the Federal Court in a later case agreed with Mansfield J about the limits of s 190B(5), holding that what is not required to satisfy this condition is 'evidence that proves directly or by inference the facts necessary to establish the claim'.<sup>22</sup> Nonetheless, the Full Court found that the factual basis 'must be in sufficient detail to enable a genuine assessment of the application by the Registrar under s 190A and related sections, and be something more than assertions at a high level of generality'.<sup>23</sup>

[23] If there is a sufficient factual basis for each particular assertion of s 190B(5), then there will also be a sufficient factual basis to support the general assertion at the head of s 190B(5) that the claimed native title rights and interests exist.<sup>24</sup> I therefore consider below the sufficiency of the factual basis against each of the three particular assertions of ss 190B(5)(a), (b) and (c).

#### ***Decision on s 190B(5)(a)***

[24] I am satisfied that the factual basis is sufficient to support the assertion of s 190B(5)(a). My reasons now follow.

*What is needed to provide a sufficient factual basis for s 190B(5)(a)?*

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<sup>19</sup> *Northern Territory v Doepel* at [16].

<sup>20</sup> *Northern Territory v Doepel* at [17].

<sup>21</sup> *Northern Territory v Doepel* at [17].

<sup>22</sup> *Gudjala People No 2 v Native Title Registrar* (2008) 171 FCR 317; [2008] FCAFC 157; (*Gudjala 2008*), per French J (as the Honourable Chief Justice then was) & Moore and Lindgren JJ at [83] and [92].

<sup>23</sup> *Gudjala 2008* at [92].

<sup>24</sup> *Northern Territory v Doepel* at [131]–[132] and *Gudjala 2007* at [43].

[25] To meet s 190B(5)(a), the factual basis must support the assertion that ‘the native title claim group have, and the predecessors of those persons had, an association with the area’. Generally on what is needed for the ‘association’ assertion:

- (a) it is not necessary for the factual basis to support an assertion that all members of the native title claim group have an association with the area at all times;<sup>25</sup>
- (b) it is necessary that the material is sufficient to support that the group as a whole presently has an association with the area and to also support an association with the area by the predecessors of the whole group over the period since sovereignty, or at least since European settlement;<sup>26</sup> and
- (c) the materials must support that the association both presently and by the group’s predecessors relates to the area as a whole.<sup>27</sup>

*Is there a sufficient factual basis for the assertion of s 190B(5)(a)?*

[26] The factual basis is sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area.

[27] Attachment F provides a general description of the factual basis for this assertion. It provides information about the historical and ethnographic references in relation to the association of the claim group’s predecessors with a region that includes the application area from the times of the early settlers:

- (a) Historical records from 1848, 1875 and 1904 identify that there were Indigenous people in the areas to the south and west of the application area living there in traditional dwellings and utilising its resources and these are the likely predecessors of the claim group—pars 5 to 9, Att F;
- (b) Ethnographic records from Meston (1896) and Parry-Okeden (1895-7) support that the Indigenous group with a connection and association to the region, including the application area, was the Bar Barrum People—para 2, Att F;
- (c) By the time of Tindale’s work on the Aboriginal groups for this region in the 1930s, there is evidence of the Bar Barrum People being connected to the area, including the Bar Barrum predecessor, Jack Robinson—para 2, Att F;

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<sup>25</sup> *Gudjala* 2007 at [52].

<sup>26</sup> *Gudjala* (2007) at [51] and [52].

<sup>27</sup> See *Martin* at [23]–[26], affirmed by Siopis J in *Corunna v Native Title Registrar* [2013] FCA 372 (24 April 2013) at [35]–[39] and [42]–[44].

- (d) The term 'Bar Barrum' defines a distinct territory created by totemic ancestors and refers to the group who under traditional law and custom owns the land created by the ancestors. Current Bar Barrum people are descended from the totemic ancestors and have inherited the land from their immediate human ancestors. The claim area is a part of that broader Bar Barrum country —paras 3–4, Att F;
- (e) A number of known Bar Barrum ancestors and predecessors are identified in the records as having a known association with the area. For instance, apical ancestor Solomon and the descendants of apical ancestor Rosie were known to have regularly scratched for tin in and around the claim area in the mining era of the 1880s; this being a way for Bar Barrum people to remain on and stay connected to their country—para 8, Att F. Another example is the Bar Barrum man, Jack Robinson, being interviewed by Tindale in 1938 and providing details of Bar Barrum language, law, custom and genealogical information about other known Bar Barrum predecessors from the time of European settlement—para 10, Att F;
- (f) There is anthropological evidence of Bar Barrum ancestors being alive at or around the time of effective sovereignty in the area. For example, apical ancestor, Rosie/Lucy Congoo was born on country around 1881 and she and her descendants have a long history from that time until the present with this area—para 15, Att F.

[28] There is evidence that this association from the time of the claim group's predecessors has continued until the present time:

- (a) Apical ancestor Rosie/Lucy Congoo's descendants include [name deleted 1] whose predecessors have a special association with the Dry River area. [name deleted 1] remembers Rosie's son [name deleted 2] speaking in language. [name deleted 2] is in fact [name deleted 1]'s father and [name deleted 1] recalls that [name deleted 2] was very strict about Aboriginal law and was a crucial figure in transmitting knowledge of Bar Barrum country to the next generation. [name deleted 1] is now a senior elder of the Bar Barrum people and continues to live on country and to be an authority on Bar Barrum law and custom. The Congoo family is central to the claim group and have lived on Bar Barrum country, close to the claim area, virtually continuously over the period since settlement—paras 15 and 16, Att F;
- (b) There are examples of other Bar Barrum families relying on the Congoo family's authority in relation to Bar Barrum country, including seeking counsel and permission to go hunting in specific areas—para 19, Att F;



- (c) One significant site on Bar Barrum country is Wild Jimmy's camping place in the Silver Valley. The story related to this site have been passed across four generations in a continuous line from the Bar Barrum ancestor Rosie Congoo— para 20, Att F;
- (d) The genealogies and associated government records that have been collected and oral histories from claim group members supports that the Bar Barrum people have lived on or close to Bar Barrum country, including the application area, since the 1870s and for well over a hundred years. This degree of continuity suggests the strength of the attachment some Bar Barrum people have with their lands and to the historical and cultural meanings that it holds for them—para 21, Att F;
- (e) There is an extensive knowledge of places and country, which surround the application area, including Stannary Hills and Collins Weir. Senior claimants have a long history of active involvement on Bar Barrum country that arises from living there, mining, camping and recreational fishing. In more recent times there has been the development of the Petford outstation and other caring for country initiatives—para 23, Att F;
- (f) There is one particular site called Skull Cave or Skull Hill, which Bar Barrum people had to travel through the claim area to access. The knowledge about this site has been passed down through the generations and there is still a practice today of visiting this site—para 31, Att F.

[29] Further support for the enduring association by the claim group with the region that includes the application area is found in a supporting affidavit by Mr [name deleted 3] in Attachment R2 of the application. I will discuss his evidence in more detail in my reasons below for the assertion of s 190B5(b).

[30] The information reviewed above is sufficient to support an assertion that the claim group have, and their predecessors had, an association with the area. The information is detailed and specific about how that association has manifested itself in a direct line of descent from known predecessors, including the apical ancestor Rosie/Lucy Congoo, who were alive in the early settlement era.

***Decision on s 190B(5)(b)***

[31] I am satisfied that the factual basis is sufficient to support the assertion of s 190B(5)(b). My reasons now follow.

*What is needed to provide a sufficient factual basis for s 190B(5)(b)?*

[32] To meet s 190B(5)(b), the factual basis must support the assertion 'that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that

give rise to the claim to native title rights and interests'. The wording of s 190B(5)(b) is almost identical to paragraph (a) of the definition of 'native title rights and interests' within s 223(1) of the Act. Dowsett J approached this in *Gudjala 2007* by considering s 190B(5)(b) in light of the case law regarding s 223(1)(a), particularly the leading decision of the High Court of Australia in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 (*Yorta Yorta*).<sup>28</sup>

[33] According to the High Court's decision in *Yorta Yorta*, a law or custom is 'traditional' where:

- (a) it 'is one which has been passed from generation to generation of a society, usually by word of mouth and common practice' — at [46];
- (b) the origins of the content of the law or custom concerned can be found in the normative rules of a society<sup>29</sup> which existed before the assertion of sovereignty by the Crown — at [46];
- (c) the normative system has had a 'continuous existence and vitality since sovereignty' — at [47];
- (d) the relevant society's descendants have acknowledged the laws and observed the customs since sovereignty and without substantial interruption — at [87].

[34] Dowsett J found that a sufficient factual basis must therefore demonstrate that the laws and customs relied on by the claim group 'have their source in a pre-sovereignty society and have been observed since that time by a continuing society'. Dowsett J held that a 'starting point must be identification of an indigenous society at the time of sovereignty or, for present purposes, in 1850-1860'. His Honour concluded that a sufficient factual basis must also establish the link between the native title claim group described in the application and the area covered by the application, which involves 'identifying some link between the apical ancestors and any society identified at sovereignty'.<sup>30</sup>

*Is the factual basis sufficient to support the assertion of s 190B(5)(b)?*

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<sup>28</sup> *Gudjala 2007* at [26] and [62] to [66].

<sup>29</sup> The term 'society' in this context is 'understood as a body of persons united in and by its acknowledgment and observance of a body of law and customs' — *Yorta Yorta* at [49].

<sup>30</sup> See *Gudjala 2007* at [63] and [66] respectively. Although the Full Court found error in Dowsett J's evaluation of the factual basis materials, the Full Court did not disagree with his Honour's assessment of what a sufficient factual basis for this assertion must address—see *Gudjala 2008* at [71]–[72]. The Full Court also agreed with Dowsett J that one question a sufficient factual basis must address is whether 'there was, in 1850–1860, an indigenous society in the area, observing identifiable laws and customs' — *Gudjala 2008* at [96]. (1850–1860 is the time of European settlement of the Gudjala application area.)

[35] It is not appropriate that I impose too high a burden when assessing these matters, having regard to the limited nature of the enquiry when assessing the factual basis condition of s 190B(5).<sup>31</sup> With these constraints in mind, I find that the factual basis provides specific and detailed information to explain the identity of the relevant pre-sovereignty normative system, which operated in the region occupied by the area of this polygon claim.

[36] The following information from Attachment F of the application speaks to the asserted traditional laws and customs:

- (a) People who are descended from a Bar Barrum apical ancestor have the right to claim Bar Barrum identity, and must be recognised as such by others as Bar Barrum People – para 11, Att F.
- (b) Rights and interests in the application area have been passed onto members of the claim group from their Bar Barrum ancestors. This illustrated by the extensive knowledge held by most claimants of the kinship relationships that operate amongst the claim group and related attachment to country – para 12, Att F.
- (c) In 1848 early explorers recorded ‘a tribe of natives’ carrying spears at a river junction a little to the south of the application – para 6, Att F.
- (d) In 1875, the explorer Mulligan, entering Bar Barrum country to the west and south of the area, observed native ‘townships’, involving groups of ‘well thatched gunyahs, each capable of accommodating five or six persons’ – para 7, Att F.
- (e) In 1938, Bar Barrum man Jack Robinson provided information to researcher Norman Tindale about Bar Barrum language, law and custom and history. Tindale’s genealogies record a list of known and identified Bar Barrum predecessors – para 10, Att F.
- (f) The co-occupation of land by the claimants with their ancestors and other spiritual beings underpins their claim to inalienable possession of their land – para 22, Att F.
- (g) There is an extensive knowledge of places and country including Stannary Hills and Collins Weir, which surround the application area. Senior claimants have a long history of active involvement on Bar Barrum country that arises from living there, mining, camping and recreational fishing. In more recent times there has been the development of the Petford outstation and other caring for country initiatives – para 23, Att F.
- (h) In traditional Bar Barrum law and custom the land can manifest spiritual and religious attributes meaning that stories and country are intrinsically related. Being on country and speaking to the spirits that reside there serves to maintain relationships with the ancestors – para 24, Att F.

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<sup>31</sup> I refer to the analysis of the case law at the outset of the reasons for the condition of s 190B(5). I refer also to a recent decision by Barker J that ‘it must be borne in mind that the provisions of the NTA dealing with registration are not, nor could they be, concerned with the proof that native title exists’ – *Stock v Native Title Registrar* [2013] FCA 1290 (29 November 2013) at [64] and also at [65]–[66].

- (i) Bar Barrum people have an obligation to reproduce their culture in the form conveyed to them by their ancestors. In the past this obligation was fulfilled by performing rituals and safe-guarding sites. Today Bar Barrum people enact this obligation through continued hunting, fishing, gathering, participation in management of natural resources and associated maintenance of knowledge regarding seasonal patterns influencing those resources – para 26, Att F.
- (j) Bar Barrum people interact with the spiritual beings within their country including their ancestors on a daily basis, in accordance with rules and regulations surrounding accessing country. Access rituals include identifying oneself to ancestral spirits, talking to the spirits and leaving a fish or portion of other resource taken for the ancestors to ensure continued goodwill and assistance from the ancestral spirits – para 35, Att F.
- (k) Failure to perform these rituals will result in mishaps, sickness, or the lack of success in activities, such as hunting and fishing, on country, brought as retribution by the spiritual forces in the landscape – para 37, Att F.
- (l) Knowledge about important sites on Bar Barrum country, including birthplaces, burial places, massacre sites, occupation sites and places where ancestral beings reside, continues to be transmitted to people within the claim group. One such site required Bar Barrum people to travel through the application area and continues to be visited by Bar Barrum today – paras 30–31, Att F.
- (m) Knowledge and authority of elders continues to be a key structure through which cultural knowledge is transmitted – para 17, Att F.
- (n) In traditional law and custom, camping and bora grounds were used ceremonially for initiation and other rituals. Traditional dancing on country continues to take place and claimants decorate themselves with ochre collected from Bar Barrum country – para 33, Att F.
- (o) Traditional use of saps and resins and other natural resources gathered from the environment by the Indigenous occupants of the area, to manufacture items such as baskets, shields, spears and boomerangs were noted by early Europeans in the area. These things continue to be manufactured and used, for example, resins are used – para 45, Att F.
- (p) Claimants have extensive knowledge of sites within the application area at which useful resources can be found – para 41, Att F.

[37] The affidavit by a member of the claim group in Attachment R2 of the application supports these assertions. This person is a descendant of the Bar Barrum apical ancestor, Rosie aka Lucy, who was his great grandmother. This person provides information that supports a life-long attachment to his Bar Barrum country, including the application area, since his birth in 1945. This person's grandfather, a Bar Barrum man was born on country at *Kooroora* (dry and thirsty land) in 1900, where he lived most of his life, leaving only briefly for work..

[38] This person describes the following traditional laws and customs:

- (a) He has a right of access to the claim area and the rest of Bar Barrum country because he is a Bar Barrum man and has inherited these rights from his Bar Barrum ancestors. He can do what he pleases on Bar Barrum country so long as he acts in accordance with Bar Barrum traditional laws and customs.
- (b) He knows the claim area well, which has been heavily mined, including by his grandfather and other Bar Barrum predecessors. He has lived in close proximity to the area for many years.
- (c) Horse Creek runs close to the claim area. It is dry most of the year except during the Wet, when it flows into the Walsh River, which is very important to the Bar Barrum people.
- (d) He and other Bar Barrum people would pass through the claim area to access nearby Skull Cave, a sacred Bar Barrum site, located just above Stannary Hills. The word for this place is *Yureka*. His [name deleted 4] showed him this place and told him it was important to Bar Barrum under their traditional laws and customs.
- (e) It is not so easy now to use the claim area as a means of access because there are too many gates and fences, so they use another way. His [name deleted 4] still takes his grannies out to Skull Cave. Recently he and [name deleted 4] went past the claim area on their way to Stannary Hills and camped in the hills nearby the claim area, which they have the right to do because they are Bar Barrum People and this is Bar Barrum country.
- (f) The claim area lies well within Bar Barrum country. He holds this belief because his Elders, including [name deleted 4], taught him about the boundaries of Bar Barrum country. [name deleted 4] was taught this by his elders. He now passes this knowledge to his own children and other Bar Barrum people.
- (g) He knows a few Bar Barrum language words and can identify important landmarks using Bar Barrum language.
- (h) Elders play a special role for the passing on of knowledge about Bar Barrum country, its special places and stories. His [name deleted 4] played this role for him and he now has responsibility as an Elder to pass these things onto younger Bar Barrum people.
- (i) He calls out to the old people and the ancestors when he is on Bar Barrum country to let them know that he is there.

- (j) There are kinship rules that he learnt growing up Bar Barrum. There are right and wrong ways to marry. Marrying too close will result in punishment under Bar Barrum traditional laws and customs. Adoption and bringing people up is a part of Bar Barrum law and custom, but those people have different rights to people who are Bar Barrum by blood.
- (k) There are totems acknowledged and observed by the Bar Barrum people. You have to protect these totems (the frill-necked lizard and crested dove).
- (l) All of these things have been passed down through the generations from the ancestors to their current descendants, the members of the Bar Barrum claim group. He is a Bar Barrum man because of descent from his Bar Barrum ancestors, who spoke that language and who had, and still have now, a physical and spiritual connection to all Bar Barrum country. It is this language, land, spirit and blood that makes him a Bar Barrum man and gives him the right to do many things on country, including the application area. He was taught this by his Elders and it is with these rights that he accesses places on Bar Barrum country to hunt, fish and camp there.
- (m) He is constantly travelling all over Bar Barrum country, making sure everything is right there and for the old Bar Barrum people who are still there.
- (n) There are places on Bar Barrum country where you can only go with a Bar Barrum elder. It is against the law for non-Bar Barrum to access these places without permission from elders, like himself and [name deleted 1]. To do so without permission will result in punishment from the old people.

[39] I am satisfied that the factual basis is sufficient for the assertion of s 190B(5)(b). The factual basis provided contains an explanation and sets out the necessary facts in a sufficiently detailed way so that I can understand both the identity of the relevant pre-sovereignty society, the area over which it existed and the links between the society, the current members of the claim group, their apical ancestors and the application area. The information provides a sufficient factual basis for the assertion that there exist traditional laws and customs derived from a pre-sovereignty society identified in the early records and that the claim group and their apical ancestors can demonstrate their links to this group over time.

***Decision on assertion of s 190B(5)(c)?***

[40] I am satisfied that the factual basis is sufficient to support the assertion of s 190B(5)(c). My reasons now follow.

*What is needed for the assertion of s 190B(5)(c)?*

[41] To meet s 190B(5)(c), the factual basis must support the assertion ‘that the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.’

[42] The factual basis needs to address that the persons in the native title claim group have continued to hold the claimed native title rights and interests by acknowledging and observing the traditional laws and customs of a pre-sovereignty society in a substantially uninterrupted way. This is the second element to the meaning of the word ‘traditional’ when used in the s 223(1)(a) definition of ‘native title rights and interests’ discussed at [47] and [87] of *Yorta Yorta*.

[43] The case law on this assertion indicates the following kinds of information are required:

- (a) That there was a society that existed at sovereignty observing traditional laws and customs from which the identified existing laws and customs were derived and were traditionally passed on to the current claim group;
- (b) That there has been a continuity in the observance of traditional law and custom going back to sovereignty or at least to European settlement.<sup>32</sup>

*Is the factual basis sufficient to support the assertion of s 190B(5)(c)?*

[44] The factual basis material identifies the pre-sovereignty society and the persons who acknowledged and observed the laws and customs of the relevant society, being the Bar Barrum people. There is information within the factual basis that goes to showing a similarity in laws and customs acknowledged and observed by the ancestors and those of the current native title claim group. There is material that outlines the transmission of laws and customs throughout the generations that can be found in the accompanying affidavit from Attachment R2 of the application. I examined this information in my reasons above for the assertion of s 190B(5)(b). It is also sufficient to find that there traditional laws and customs have continued to be acknowledged and observed over the period since European settlement of the region occupied by the claim.

### **Decision on prima facie case: s 190B(6)**

[45] The claim meets the requirements of s 190B(6) as I consider that, prima facie, all of the claimed native title rights and interests can be established. My reasons now follow.

*What is needed to meet this condition?*

[46] To meet s 190B(6), there must be some substance to the material before the Registrar to show on a prima facie basis that some of the claimed native title rights and interests can be established. The following case law guides the Registrar in relation to this condition:

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<sup>32</sup> See *Gudjala (2007)* at [82] and *Gudjala FC* at [96].

- (a) it requires some measure of the material available in support of the claim;<sup>33</sup>
- (b) although s 190B(5) directs attention to the factual basis on which it is asserted that the native title rights and interests are claimed, this does not itself require some weighing of that factual assertion as that is the task required by s 190B(6);<sup>34</sup>
- (c) the condition of s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.<sup>35</sup>
- (d) Mansfield J found that the use of the words 'prima facie' in s 190B(6) means that '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'.

***Are the claimed rights and interests established on a prima facie basis?***

[47] I consider that there is evidence sufficient to establish on a prima facie basis all of the claimed rights. These are the following native title rights and interests:

1. In relation to land where there has been no prior extinguishment of native title or where s238 (the non-extinguishment principle) applies, the native title rights and interests claimed are the exclusive rights to possession, occupation, use and enjoyment of the claim area as against the whole world, pursuant to the traditional laws and customs of the claim group, but subject to the valid laws of the Commonwealth of Australia and the State of Queensland, and
2. With regard to all remaining land within the claim area, the native title rights and interests claimed are not to the exclusion of all others and are non-exclusive rights to:
  - a. Access, be present on, move about on and travel over the area;
  - b. Camp, and live temporarily on the area as part of camping, and for that purpose build temporary shelters;
  - c. Hunt, fish and gather on the land and waters of the area for personal, domestic and non-commercial communal purposes;
  - d. Take and use natural resources from the land and water of the area for personal, domestic and non-commercial communal purposes;
  - e. Take and use the water of the area for personal, domestic and non-commercial communal purposes;
  - f. Conduct ceremonies on the area;
  - g. Be buried and bury native title holders within the area;
  - h. Maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm;
  - i. Teach on the area the physical and spiritual attributes of the area;
  - j. Hold meetings on the area; and

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<sup>33</sup> *Northern Territory v Doepel* at [126].

<sup>34</sup> *Northern Territory v Doepel* at [127].

<sup>35</sup> *Northern Territory v Doepel* at [132].



- k. Light fires on the area for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation;
- 3. For water, the non-exclusive rights to:
  - a. Hunt, fish and gather from the water of the area;
  - b. Take and use the natural resources of the water in the area; and
  - c. Take and use the water of the area, for personal, domestic and non-commercial communal purposes.

*Exclusive right of possession, occupation, use and enjoyment as against the whole world*

[48] The exclusive right is prima facie established. The material provided in Attachment F and the supporting affidavit from a senior member of the claim group in Attachment R2 provides sufficient information to identify that the Bar Barrum people have rights in relation to land or waters for a region that includes the application area. There is evidence of long standing connections with the area that date back to the time of the European settlers in the late 19<sup>th</sup> century.

[49] It is clear that pursuant to their traditional laws and customs, the members of the native title claim group consider themselves to be the owners of the land and waters of Bar Barrum country, including the application area. For example, Attachment F states that ‘the term Bar Barrum is also a reference to the group who, under traditional law and custom, owns the land created by ancestors’ – at para 3. A senior claimant and Bar Barrum elder has provided an affidavit describing a camping trip close to the claim area recently:

I have the right to do this because we are Bar Barrum People and this is Bar Barrum country.

[50] It is claimed that Bar Barrum People have a responsibility to protect their country from trespassers, and at the same time to ensure the safety of any such persons from harm from spiritual forces in the landscape. This person states in his affidavit:

There are places in the application area where you can only go with a Bar Barrum Elder with you. Non-Bar Barrum people cannot even go there.

If they do, without permission, they will get sick as a punishment from our old people.

Under the traditional law and customs, non-Bar Barrum People must seek the permission from Elders ... to access Bar Barrum country.

[51] The material speaks in some detail of the understanding claimants have of the spiritual forces that inhabit the landscape, including the spirits of their ancestors, and the way in which those forces can bring harm upon persons who access or use the area in a way that is inconsistent with Bar Barrum traditional law and custom – see for example paragraphs 25 and 35–37 of Attachment F of the application.

[52] I consider it is also clear in the information before me that there are specific laws and customs surrounding those persons within the native title claim group who have the authority to

speak for country. The material indicates that only persons considered by the rest of the group to be Elders are able to adopt this role—see the explanation for this in paragraphs 17 to 20 of Attachment F.

[53] I consider that the material evidences that a right to exclusive possession, pursuant to the traditional laws and customs of the Bar Barrum People, encompasses both a right of members of the claim group to speak for country, and a right of members of the group to be ‘gatekeepers for the purpose of preventing harm, and avoiding injury to country’ in the manner discussed by the Full Court in *Griffiths v Northern Territory* [2007] FCAFC 178 (*Griffiths*) at [127].

*Non-exclusive rights of access and use of the area and its resources*

[54] I find that there is sufficient information to prima facie establish all of the rights and interests described in paragraphs 2 and 3 of Schedule E. Noting above that on the material before me, I have considered a right to exclusive possession prima facie established, in my view it naturally follows that the non-exclusive rights related to their access of and use of the resources of the lands and waters encompassed by the application are also prima facie established.

[55] This material shows a history of access to the wider region of Bar Barrum country and to the application area that dates back to the time of European settlement in the late 19<sup>th</sup> century. The use of resources are subject to rules and the claim group camp and visit the area to access, teach about and protect its significant sites. There is evidence of inter-generational transmission of laws and customs from apical ancestors alive in the settlement era, through the generations to the members of the claim group today. The material refers to sites that are significant to the members of the claim group today, including Skull Cave, which is proximate to the application area and the use of a route through the application area to visit this place. There is also evidence of Bar Barrum country being imbued with the spirits of old Bar Barrum people and customs of talking to these ancestral spirits and leaving them fish or a portion of other resources taken to ensure their good will and assistance from those ancestral spirits. This is passed down through the generations through the telling of stories and taking people to sacred Bar Barrum places.

**Decision on traditional physical connection: s 190B(7)**

[56] The claim meets the requirements of s 190B(7) as I am satisfied that [name deleted 3] is a member of the native title claim group and currently has or previously had a traditional physical connection with the application area.

[57] The case law on this condition provides the following guidance:

- (a) ‘It does require the Registrar to be satisfied of a particular fact or particular facts’ and ‘some evidentiary material to be presented to the Registrar’.

[58] However the focus is confined and not ‘the same focus as that of the Court when it comes to hear and determine the application for determination of native title rights and interests. The focus is upon the relationship of at least one member of the native title claim group with some part of the claim area’.<sup>36</sup>

[59] The evidence surrounding this connection is provided in his affidavit dated 24 November 2015, the contents of which I consider in my reasons above. The evidence shows that he is a Bar Barrum elder whose great grandmother was an apical ancestor for the Bar Barrum people. The evidence shows a lifelong association with Bar Barrum country, including with a path that traverses the application area and was traditionally used to access an important site, Skull Cave. The evidences shows that he hunts, camps and fishes on the traditional country of his Bar Barrum ancestors and interacts with that country and his ancestors in traditional ways.

### **Decision on no failure to comply with s 61A: s 190B(8)**

[60] The claim meets the requirements of s 190B(8). I am satisfied that the application and accompanying documents do not disclose and I am 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. My reasons now follow.

#### ***What is needed to meet s 190B(8)?***

[61] This section provides that applications must not be made:

- (a) over areas already covered by an approved determination of native title;
- (b) over areas where a previous exclusive possession act attributable to the Commonwealth or a State or Territory was done;
- (c) which claim exclusive possession, occupation, use and enjoyment in relation to areas where a previous non-exclusive possession act was done and is attributable to the Commonwealth or a State or Territory.

#### ***Does the application meet these three requirements?***

[62] I am satisfied that there is no prohibition against the claim because of this condition:

- (a) a search has revealed that there are no approved native title determinations over the application area, thus meeting s 61A(1);
- (b) schedule B expressly excludes any such areas covered by a previous exclusive possession act, thus meeting s 61A(2);
- (c) Schedule E is drafted to make clear that there is no claim to a right of exclusive possession occupation use and enjoyment where there has been extinguishment of such a right by a previous non-exclusive possession act, thus meeting s 61A(3). See also Schedule B of the application.

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<sup>36</sup> *Northern Territory v Doepel* at [17].

### **Decision on no extinguishment etc. of claimed native title: s 190B(9)**

[63] The claim meets the requirements of s 190B(9). I am satisfied that the application and accompanying documents do not disclose and I am not otherwise aware, that:

- (a) to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas—the Crown in right of the Commonwealth, a State or Territory wholly owns the minerals, petroleum or gas;
- (b) to the extent that the native title rights and interests claimed relate to waters in an offshore place—those rights and interests purport to exclude all other rights and interests in relation the whole or part of the offshore place;
- (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

[64] The claim meets this condition because:

- (a) Schedules E and Q of the application state that there is no claim to ownership of minerals, petroleum or gas wholly owned by the Crown;
- (b) the application area does not extend to any offshore places;
- (c) there is no information before me to indicate that the native title rights and interests claimed have been otherwise extinguished.

### *Conditions about procedural and other matters: s 190C(1)*

#### **Decision on prescribed information and accompanying affidavit: s 190C(2)**

[65] The claim meets the condition of s 190C(2) as I am satisfied that the application contains the details and other information and is accompanied by the documents prescribed by ss 61 and 62. My reasons now follow.

*Applications that may be made: s 61(1)*

[66] Section 61(1) provides that a native title determination application must be made by ‘a person or persons authorised by all the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group’.

[67] I must check to see that there is information about the native title claim group and the authority of the applicant. I am not empowered to go behind this information unless there is something on the face of the application to indicate that ‘not all the persons in the native title claim group were included, or that it was in fact a sub-group of the native title claim group’—see

*Northern Territory v Doepel* at [36]. There is nothing on the face of the application to indicate that the claim is not made on behalf of all the persons in the native title claim group.

*Applicant's name and address for service: s 61(3)*

[68] This information is provided on the first and final pages of the Form 1 application.

*Applications authorised by persons: s 61(4)*

[69] This section provides that a 'native title determination application that persons in a native title claim group authorise the applicant to make must: (a) name the persons; or (b) otherwise describe the persons sufficiently clearly so that it can be ascertained whether any particular person is one of those persons'. Schedule A contains a description of the persons in the native title claim group. Dowsett J held that the task here is merely to assess that the persons are named or a description provided and whether those details are sufficient is the task of the corresponding merit condition in s 190B(3).<sup>37</sup>

*Affidavits in prescribed form: s62(1)(a)*

[70] There are affidavits from the four persons who comprise the applicant. I find that the affidavits have all been signed in the presence of a witness and contain the five statements required by this section. Therefore, I am satisfied under s 190C(2) that the application is accompanied by the required affidavit.

*Information about the boundaries of the area covered by the application and any areas within those boundaries not covered and map showing the boundaries: s 62(2)(a) & (b)*

[71] The required details are in Schedule B and a map showing the boundaries is in Attachment C.

*Searches of any non-native title rights and interests carried out: s 62(2)(c)*

[72] Schedule D states that there are no searches.

*Description of native title rights and interests claimed in relation to particular land or waters: s 62(2)(d)*

[73] Attachment E contains a description of the claimed native title rights and interests. See my reasons above at s 190B(4) which analyses the adequacy of the description and finds it be sufficient to allow the rights claimed to be readily identified. It follows that the description does not consist of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

*Activities: s 62(2)(f)*

[74] These details are in Schedule G.

*General description of factual basis for assertion that native title exists: s 62(2)(e)*

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<sup>37</sup> See *Gudjala 2007* at [31] and [32].

[75] This description is provided in Attachment F. See my reasons above for the condition of s 190B(5). Attachment F suffices as a general description of the factual basis for the assertion that the claimed native title exists and for the particular assertions provided in subsections (i) to (iii) of s 62(2)(e).

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

[76] Schedule H identifies one overlapping non-claimant application (QUD401/2015).

*Future act notices: ss 62(2)(ga) and (h)*

[77] Schedule HA states that there are no notices under s 24MD, of which the applicant is aware. Attachment I provides details of known s 29 notices.

### **Decision on no common claimants in previous overlapping applications: s 190C(3)**

[78] The claim meets the requirements of s 190C(3). My reasons now follow.

[79] To meet s 190C(3), the Registrar 'must be satisfied that no person included in the native title claim group for the application (the *current application*<sup>38</sup>) was a member of a native title claim group for any previous application'. To be a 'previous application':

- (a) the application must overlap the current application in whole or part;
- (b) there must be an entry for the claim in the previous application on the Register of Native Title Claims when the current application was made; and
- (c) the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[80] A search<sup>39</sup> reveals that there are no previously registered claimant native title applications that overlap the area of the application, such that there is no requirement for me to consider the issue of common members.

### **Decision on identity of claimed native title holders: the authorisation condition of s 190C(4)**

[81] The claim meets the requirements of s 190C(4) as I am satisfied that that the application has been certified by the representative Aboriginal/Torres Strait Islander body or bodies for the area covered by the application.

*What is required to meet s 190C(4)?*

[82] To meet s 190C(4), one of two things must be in place:

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<sup>38</sup> Emphasis in original.

<sup>39</sup> See Geospatial overlaps analysis dated 7 December 2015.

- (a) the Registrar must be satisfied that the application has been certified by the representative Aboriginal/Torres Strait Islander body or bodies for the area covered by the application;<sup>40</sup> or
- (b) the Registrar must consider the information contained in the application and form the opinion that he is satisfied that 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.<sup>41</sup>

[83] I have considered the condition of s 190C(4) in the way dictated by subsection (a) as the representative body for the area has certified the application.

*Has the application been certified?*

[84] I find that the application has been certified. In this case, there is only one representative Aboriginal/Torres Strait Islander body for the area, which is the North Queensland Land Council. NQLC's area of responsibility entirely covers the application area.<sup>42</sup>

[85] The certification by NQLC is provided in Attachment R of the application. It is signed by the Chief Executive Officer, Steve Ducksbury, dated 24 November 2015.

[86] To meet the requirements of this condition, the certification must comply with the provisions of s 203BE(4)(a) to (c). For the reasons that follow, I find that these requirements are met.

[87] The certification complies with subsection (a) as it contains the required statement of the representative body's opinion that all persons in the native title claim group have authorised the applicant to make the application and deal with all matters in relation to it and 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.

[88] The certification complies with subsection (b) as it briefly sets out the reasons for being of the above opinion.

[89] The final part of s 203BE(4)(c) requires the representative body to, 'where applicable, briefly set out what the representative body has done to meet the requirements of s 203BE(3)'. Section 203BE(3) requires the representative body to make all reasonable efforts to achieve agreement between competing claimants and to minimise the number of overlapping applications over an area of land and waters. The certificate contains brief information to indicate that NQLC does not intend to lodge any overlapping claims and is not aware of any other persons who intend to do so.

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<sup>40</sup> See ss 190C(4)(a).

<sup>41</sup> See ss 190C(4)(b) and (5). Subsection (5) prescribes the information required in the event that the application is not certified by the representative body.)

<sup>42</sup> See Geospatial overlaps analysis dated 7 December 2015.