

Registration Decision

Application name	Bar Barrum People #9
Name of applicant	Michael Congoo, Shelton Murphy, Andrew Timothy Congoo, Warren Congoo
Federal Court of Australia No.	QUD1076/2015
NNTT No.	QC2015/015
Date of Decision	13 October 2017

Decision: Claim accepted for registration

I have decided that the claim in the Bar Barrum People #9 amended application satisfies all of the conditions in ss 190B and 190C of the *Native Title Act 1993* (Cth).¹ Therefore the claim is accepted for registration and its entry remains on the Register of Native Title Claims.

Lisa Jowett
*Delegate of the Native Title Registrar*²

¹ All legislative sections are from the *Native Title Act 1993* (Cth) (the Act), unless stated otherwise.

² Delegate of the Native Title Registrar pursuant to sections 190, 190A, 190B, 190C, 190D of the *Native Title Act 1993* (Cth) under an instrument of delegation dated 23 August 2017 and made pursuant to s 99 of the Act.

CASES CITED

Gudjala People #2 v Native Title Registrar [2007] FCA 1167 ('*Gudjala 2007*')
Northern Territory v Doepel (2003) 133 FCR 112; (2003) 203 ALR 385; [2003] FCA 1384 ('*Doepel*')
Wakaman People #2 v Native Title Registrar and Authorised Delegate [2006] FCA 1198 ('*Wakaman*')
Western Australia v Native Title Registrar (1999) 95 FCR 93; [1999] FCA 1591 ('*Western Australia v Native Title Registrar*')

BACKGROUND

- [1] The Bar Barrum #9 application was first made on 25 November 2015 on behalf of the Bar Barrum native title claim group and is one of 10 current and previous claims made by the group, 5 of which are the subject of full determinations of native title. It covers approximately 1.5 square kilometres of land and waters located south east of Cairns in Queensland. The area covered by the application is also subject to a non-claimant application: QUD401/2015—The Osborne Property Company Pty Ltd.
- [2] On 7 July 2017, the Federal Court (the Court) granted leave to amend the application. Pursuant to s 64(4), the Registrar of the Court gave a copy of the amended application and accompanying affidavits to the Native Title Registrar (Registrar) on 14 July 2017.

Registration conditions

- [3] The Court's referral of the amended application has triggered the Registrar's duty to consider the claim made in the application for registration in accordance with s 190A³. Sections 190A(1A), (6), (6A) and (6B) set out the decisions available to the Registrar under s 190A. Subsection 190A(1A) provides for exemption from the registration test for certain amended applications and s 190A(6A) provides that the Registrar must accept a claim (in an amended application) when it meets certain conditions. Section 190A(6) provides that the Registrar must accept the claim for registration if it satisfies all of the conditions of s 190B (which deals mainly with the merits of the claim) and s 190C (which deals with procedural and other matters). Section 190A(6B) provides that the Registrar must not accept the claim for registration if it does not satisfy all of the conditions of ss 190B and 190C.
- [4] I am satisfied that neither ss 190A(1A) nor 190A(6A) apply to the claim made in this amended application. The granting of leave by the Court to amend the application was not made pursuant to s 87A, and thus the circumstance described in s 190A(1A) does not arise. The amendments to the application include a change to the description of the native title claim group at Schedule A and this is not of a type contemplated in s 190A(6A) and does not therefore meet the exemption requirements of that condition. The test for registration of this amended application therefore requires my consideration against all of the conditions set out in ss 190B and 190C.
- [5] I have decided that the claim satisfies all of the conditions for registration and my reasons on each condition follow below.

Information considered

³ See subsection 190A(1).

- [6] Section 190A(3) sets out the information to which the Registrar must have regard in considering a claim under s 190A and provides that the Registrar ‘may have regard to such other information as he or she considers appropriate’.
- [7] As required, I have had regard to information in the application and accompanying documents⁴. I note there is no information before me obtained as a result of any searches conducted by the Registrar of State/Commonwealth interest registers⁵. The State of Queensland has not provided submissions in relation to the application of the registration test⁶.
- [8] I may also have regard to such other information as I consider appropriate⁷ and it is on that basis I have had regard to the previous delegate’s statement of reasons for her decision⁸ to accept the application for registration when it was first made on 25 November 2015. In my view the reasons for decision provided by the delegate remain relevant and applicable because the current amended application relies on the same material relied on by the original application. The only material difference between the original application and the amended one now before me for consideration is a change to the description of the native title claim group. I deal with this below in my reasons at s 190B(5).
- [9] I have read the previous delegate’s statement of reasons and formed the view that I agree with her summaries of the material and the relevant law and her assessment, reasoning and conclusions in respect of the merit and procedural conditions for registration. It is on this basis that I have decided to adopt the previous delegate’s summaries of the material where I consider them applicable to the amended application because the same facts and law apply. I therefore adopt the reasons of the previous delegate where I reach the same conclusion and agree with the basis for her conclusions.
- [10] I have also considered information contained in an overlap analysis and geospatial assessment by the Tribunal’s Geospatial Services dated 27 July 2017 (the geospatial report).

Merits of the claim (s 190B) – Conditions met

IDENTIFICATION OF AREA SUBJECT TO NATIVE TITLE – s 190B(2)

- [11] I am satisfied the claim meets the requirements of s 190B(2). The information provided about the external boundary and internally excluded areas are sufficient to identify with reasonable certainty the particular land or waters over which native title rights and interests are claimed.
- [12] To meet the requirements of s 190B(2), the Registrar must be satisfied that the information and map contained in the application identify with reasonable certainty the ‘particular land and waters’ where native title rights and interests are claimed. The two questions for this condition are whether the information and map provide certainty about:
- (a) the external boundary of the area where native title rights and interests are claimed;
 - and

⁴ See s 190A(3)(a).

⁵ See s 190A(3)(b).

⁶ See s 190A(3)(c).

⁷ See s 190A(3).

⁸ Dated 25 May 2016.

(b) any areas within the external boundary over which no claim is made.⁹

[13] The geospatial report confirms that the area covered by the application has not been amended or reduced.

[14] The previous delegate was of the view that the information at Schedule B and Attachment C of the original application was sufficient to enable the area to be identified with reasonable certainty. The description of the areas covered and not covered by the application remains the same and I adopt the previous delegate's consideration as I consider it applicable to the amended application because the same facts and law apply.

[15] I therefore adopt the reasons of the previous delegate as I have reached the same conclusion and agree with the basis for those conclusions.

IDENTIFICATION OF THE NATIVE TITLE CLAIM GROUP – s 190B(3)

[16] I am satisfied the claim meets the requirements of s 190B(3). Schedule A provides a description of the native title claim group in accordance with s 190B(3)(b).

[17] To meet the requirements of 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.

[18] The only question for this condition is 'whether the application enables the reliable identification of persons in the native title claim group': whether the claim has been made on behalf of the correct native title claim group is not relevant.¹⁰

[19] Carr J in (*Western Australia v Native Title Registrar*) was of the view that 'it 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'—at [67].

[20] Schedule A of the application does not name the persons in the native title claim group but contains a description of that group, being the basis for its composition. The description of the native title claim group has been amended and I therefore do not rely on or adopt the reasons for decision of the previous delegate as to whether the application satisfies the requirements of s 190B(3)(b).

[21] The native title claim group is described at Schedule A as follows:

The Bar Barrum native title claimant group is comprised of the biological and adopted (in accordance with traditional law and custom) descendants of:

1. Rosie aka Lucy (mother of William Congo);
2. Nellie (mother of Albert Bennett);
3. Millie (mother of Alick/Aleck Collins aka Chalk aka Stevens) and of her siblings Fred and Jack Solomon;
4. Maggie Watsonville (mother of May Thynne);
5. Nora Miller nee Clark, and of her brother Billy;
6. Arkarangan and Kurimbu (parents of Jack Robinson);
7. Jack Brumby (father of Peter Fagan and Monday);

⁹ Doepel at [122]

¹⁰ Doepel at [51] and [37]; *Gudjala 2007* at [33].

8. Archie Perrott aka Campbell (father of Margaret Perrott);
9. John Burt Grainer (father of John Grainer and Paddy Hastie);
10. Lizzie Simmonds (mother of Mamie Simmonds);
11. Nellie Williams, and of her sister Ethel Perrott; and
12. Bessie Tiger (mother of Peter Freeman).

- [22] In my view, the description of the native title claim group is capable of being readily understood and is sufficiently clear such that it can be ascertained whether any particular person is in that group. I understand that membership of the native title claim group is regulated by descent from or adoption by a Bar Barrum ancestor(s). The description names the apical ancestors through which members of the native title claim group will claim descent.
- [23] It may be that some factual inquiry is required to establish a person's descent (by birth or adoption) from any of the named ancestors, but that would not mean that the group has not been sufficiently described.

IDENTIFICATION OF CLAIMED NATIVE TITLE – s 190B(4)

- [24] I am satisfied the description in Schedule E is sufficient for me to clearly understand and identify the itemised rights as 'native title rights and interests.'
- [25] To meet the requirements of s 190B(4), the Registrar must be satisfied that the application's description of the claimed native title rights and interests is sufficient to allow the 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 understandable, having regard to the definition of the term 'native title rights and interests' in s 223 of the Act.¹¹
- [26] Schedule E of the application has not been amended.
- [27] The previous delegate was satisfied the description of the claimed native title rights and interests in the original application were understandable and had meaning. As the description in the amended application remains the same as in the original application, I adopt the previous delegate's consideration as I consider it applicable to the amended application because the same facts and law apply.
- [28] I therefore adopt the reasons of the previous delegate as I have reached the same conclusion and agree with the basis for those conclusions.

FACTUAL BASIS FOR CLAIMED NATIVE TITLE – s 190B(5)

- [29] 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. In particular, I am satisfied there is sufficient factual basis to support the three assertions of subsections 190B(5)(a), (b) and (c).
- [30] To meet the requirements of s 190B(5), the Registrar must be satisfied there is sufficient factual basis to support the assertion that the claimed native title rights and interests exist. 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;

¹¹ *Doepel* at [99] and [123].

- (b) that there exist traditional law acknowledged by, and traditional customs observed by, the native title claim group that give rise to native title rights and interests; and
- (c) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.

[31] My task to assess whether the asserted facts can support the existence of the claimed native title rights and interests, rather than determine whether there is 'evidence that proves directly or by inference the facts necessary to establish the claim'.¹²

The factual basis material for the claim made in the original application

[32] I have read the application, specifically at Attachment F and the affidavit affirmed by John Wason on 24 November 2015 and considered the entirety of the amended application against the requirements for the provision of a sufficient factual basis. This is the same material as was before the previous delegate when she considered the original application for registration.

[33] I have read the previous delegate's statement of reasons and formed the view that I agree with her summaries of the material and the law and her assessment, reasoning and conclusions in respect of the three assertions for the factual basis condition. It is on this basis that I have decided to adopt the previous delegate's summaries of the material and the law as I consider them applicable to the amended application because the same facts and law apply. I therefore adopt the reasons of the previous delegate as I have reached the same conclusion and agree with the basis for her conclusions.

Composition of the native title claim group

[34] In this amended application, the description of the native title claim group has undergone some adjustment, namely, refining the descriptions of two descent lines and the addition of two further apical ancestors (which may imply additional lines of descent).

[35] I have considered this refinement of the composition of the Bar Barrum claim group and the extent to which the factual basis continues to support the asserted existence of the native title rights and interests claimed by the native title claim group in the amended application. In my view, the effect of this refinement does not create a further impost on the claim's factual basis in order for it to meet the requirements of s 190B(5). I am not required to be satisfied that each and every apical ancestor had an association with the area of the application, and consequently that all members of the native title claim group now have an association at all times. What is required is for the factual basis material to evidence an association between the whole group and the area and an association between the predecessors of the whole group and the area over the period since sovereignty¹³. I am of the view that the factual basis material sufficiently identifies the Indigenous society that is asserted to have existed at the time of sovereignty, or first European contact, in the area covered by the application. In this sense, it is not my task to ensure that each and every apical ancestor identified in the description of the native title claim group was a member of that society, those persons are simply used to define the claim group¹⁴.

¹² Doepel at [16]-[17]; *Gudjala (2008)* at [83] and [92]

¹³ *Gudjala 2007* at [52].

¹⁴ *Gudjala 2007* at [66].

s 190B(5)(a)

[36] The previous delegate was satisfied the factual basis provided in support of the original application was sufficient to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area. As the claim in the amended application relies on the same factual basis materials as did the original application, I adopt the previous delegate's consideration as I consider it applicable to the amended application because the same facts and law apply.

[37] I therefore adopt the reasons of the previous delegate as I have reached the same conclusion and agree with the basis for those conclusions.

s 190B(5)(b)

[38] The previous delegate was satisfied that the factual basis for the original application was sufficient to support an assertion that there exist traditional laws acknowledged, and traditional customs observed, by the native title claim group giving rise to the claim to native title. As the claim in the amended application relies on the same factual basis materials as did the original application, I adopt the previous delegate's consideration as I consider it applicable to the amended application because the same facts and law apply.

[39] I therefore adopt the reasons of the previous delegate as I have reached the same conclusion and agree with the basis for those conclusions.

s 190B(5)(c)

[40] The previous delegate was satisfied that the factual basis for the original application was sufficient to support the continuity of the acknowledgment and observance of traditional law and custom, going back to settlement. As the claim in the amended application relies on the same factual basis materials as did the original application, I adopt the previous delegate's consideration as I consider it applicable to the amended application because the same facts and law apply.

[41] I therefore adopt the reasons of the previous delegate as I have reached the same conclusion and agree with the basis for those conclusions.

PRIMA FACIE CASE – s 190B(6)

[42] I consider that all of the claimed rights and interests have been established on a prima facie basis and the claim satisfies the condition of s 190B(6).

[43] To meet the requirements of s 190B(6), the Registrar 'must consider that, prima facie, at least some of the native title rights and interests claimed can be established.' I note the following comments by Mansfield J in relation to this condition:

1. it requires some measure of the material available in support of the claim;¹⁵
2. 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);¹⁶

¹⁵ *Doepel at [126]*

¹⁶ *Doepel at [127]*.

3. s 190B(6) appears to impose a more onerous test to be applied to the individual rights and interests claimed.¹⁷

[44] 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’¹⁸.

[45] Schedule E has not been amended, the same rights are claimed as claimed in the original application. As the evidentiary material for the claim made in the amended application remains the same as for the original application, I adopt the previous delegate’s consideration as I consider it applicable to the amended application because the same facts and law apply. The previous delegate considered each of the claimed rights to be prima facie established and consequently they were all entered on the Register.

[46] I therefore adopt the reasons of the previous delegate as I have reached the same conclusion and agree with the basis for those conclusions. I am satisfied, having reviewed the information accompanying the amended application in relation to the rights claimed and the previous delegate’s statement of reasons, that all the rights claimed can be established prima facie.

PHYSICAL CONNECTION – s 190B(7)

[47] I am satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with a part of the claim area.

[48] To meet the requirements of s 190B(7), the Registrar ‘must be satisfied that at least one member of the native title claim group currently has or previously had a traditional physical connection with any part of the land or waters covered by the application’¹⁹.

[49] The previous delegate was satisfied that Mr John Wason currently has, and previously had, a traditional physical connection with the application area. As the evidentiary material for the claim made in the amended application remains the same as for the original application, I adopt the previous delegate’s consideration as I consider it applicable to the amended application because the same facts and law apply.

[50] I therefore adopt the reasons of the previous delegate as I have reached the same conclusion and agree with the basis for those conclusions.

NO FAILURE TO COMPLY WITH S 61A – s 190B(8)

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

Requirement	Information addressing requirement	Result
s 61A(1) no native title determination application if approved determination of native title	Geospatial report, overlap analysis	met
s 61A(2) claimant application not to be made covering	Schedule B, para 1	met

¹⁷ Doepel at [132].

¹⁸ Doepel at [135].

¹⁹ See subsection 190B(5)(a).

previous exclusive possession over areas		
s 61A(3) claimant applications not to claim certain rights and interests in previous non-exclusive possession act areas	Schedule B, para 3	met

NO EXTINGUISHMENT ETC. OF CLAIMED NATIVE TITLE – s 190B(9)

[52] In my view the application does not offend the provisions of ss 190B(9)(a), (b) and (c) and therefore the application meets the condition of s 190B(9).

Requirement	Information addressing requirement	Result
(a) no claim made of ownership of minerals, petroleum or gas that are wholly owned by the Crown	Schedule Q	met
(b) exclusive possession is not claimed over all or part of waters in an offshore place	Schedule P	met
(c) native title rights and/or interests in the application area have otherwise been extinguished	Schedule B, para 1(l)	met

Procedural and other matters (s 190C)—Conditions Met

INFORMATION ETC. REQUIRED BY SECTIONS 61 AND 62 – s 190C(2)

[53] I have examined the application and I am satisfied that it contains the prescribed information and is accompanied by the prescribed documents.

[54] To meet the requirements of s 190C(2), the Registrar must be satisfied that the application contains all of the prescribed details and other information, and is accompanied by any affidavit or other document, required by ss 61 and 62. This condition does not require any merit or qualitative assessment of the material to be undertaken²⁰.

Subsection 61

[55] The application contains the details specified in s 61.

Section	Details	Form 1	Result
s 61(1)	Native title claim group	Part A and Schedule A	met
s 61(3)	Name and address for service	Part B	met
s 61(4)	Native title claim group named/described	Schedule A	met

Subsection 62

[56] The application contains the details specified in s 62.

Section	Details	Form 1	Result
s 62(1)(a)	Affidavits in prescribed form	Attachments R3-R6	met
s 62(2)(a)	Information about the boundaries of the area	Schedule B	met
s 62(2)(b)	Map of external boundaries of the area	Attachment C	met
s 62(2)(c)	Searches	Schedule D	met
s 62(2)(d)	Description of native title rights and interests	Schedule E	met

²⁰ *Doepel* at [16] and [35] to [39].

Section	Details	Form 1	Result
s 62(2)(e)	Description of factual basis:	Schedule & Attachment F	met
s 62(2)(f)	Activities	Schedule G	met
s 62(2)(g)	Other applications	Schedule H	met
s 62(2)(ga)	Notices under s 24MD(6B)(c)	Schedule HA	met
s 62(2)(h)	Notices under s 29	Schedule I	met

NO PREVIOUS OVERLAPPING CLAIM GROUP – s 190C(3)

[57] I am satisfied that no person is included in the native title claim group for this application that was a member of the native title claim group for any previous overlapping application.

[58] To meet the requirements of s 190C(3), the Registrar ‘must be satisfied that no person included in the native title claim group for the application (the current application) was a member of a native title claim group for any previous application’. To be a ‘previous application’:

1. the application must overlap the current application in whole or part;
2. 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
3. the entry must have been made or not removed as a result of the previous application being considered for registration under s 190A.

[59] The geospatial report confirms that no native title determination applications fall within the external boundaries of the current application. As the Bar Barrum #9 application is not overlapped by any other applications, there is no requirement that I consider the issue of common claim group membership.

IDENTITY OF CLAIMED NATIVE TITLE HOLDERS – s 190C(4)

[60] I am satisfied that the requirements set out in s 190C(4)(a) are met because the application has been certified by the representative Aboriginal/Torres Strait Islander body that could certify the application. That body is North Queensland Land Council Native Title Representative Body Aboriginal Corporation (as confirmed by the geospatial report).

[61] The amended application relies on the same certification, dated 24 November 2015, as the original application. The previous delegate was satisfied that the certification addressed all of the matters prescribed by ss 203BE(4)(a), (b) and (c) and, consequently, that it was a valid certification. As the certification of the amended application remains the same as that of the original application, I adopt the previous delegate’s consideration as I consider it applicable to the amended application because the same facts and law apply.

[62] *Wakaman* is authority that an amended application does not generally require a fresh certification, if the applicant and the certifying body clearly intend that it applies to the amended application. In that decision, the applicant sought review of the Registrar’s decision not to accept for registration its amended application. The delegate of the Registrar had found that the native title claim group described in the amended application was a wider, and significantly different, group from that referred to in the previous application, which had been

the subject of the certification. That is, ‘the certification earlier provided could not relate to the application brought on behalf of a wider, and therefore different, group’²¹.

- [63] In *Wakaman*, Kiefel J took a commensurate approach to the task at s 190C(4)(a) as taken by Mansfield J in *Doepel*. Her Honour accepted that it is ‘part of the delegate’s function under the NTA to consider whether the certification is of the particular application under consideration’, which would necessarily involve a consideration of the applicant’s intention²². Her Honour refers to Mansfield J’s observation ‘that s 203B(2) emphatically states that the representative body ‘*must not*’ provide its certificate unless it is of the opinion that all persons in the claim group have authorised the applicant to make the application’. She agreed with his Honour that ‘s 190C(4)(a) does not leave some residual obligation upon the Registrar, once satisfied of the matters to which it expressly refers, to revisit the certification of the representative body (at [81])’²³.
- [64] Kiefel J said that the rejection of a certification on the sole ground that it was given in relation to an earlier version of the application would be ‘unduly technical’ and ‘inappropriate to procedures under the Act’²⁴. Her Honour decided that because the application had been certified and the applicant and representative body ‘clearly intended’ the certification to apply to the amended application, the delegate was not required or permitted under s 190C(4)(a) to be satisfied about the correctness of the certification. This is because ‘certification means that the function has been carried out by the representative body and there is no basic function for the Registrar to carry out’²⁵. Kiefel J concluded that the earlier certification in that case should be treated as applying to the later application.
- [65] In my view, it is clear that the applicant’s intention is that the previous certification apply to this amended application. Amendments to Part A, Authorisation of the Form 1 include the details referring to the ongoing authority of the applicant and Schedule R refers to the previous certificate attached to the Form 1 at Attachment R1. In line with the authorities in *Doepel* and *Wakaman*, there is no requirement for me to consider or be satisfied about the correctness of the certification.
- [66] I therefore adopt the reasons of the previous delegate as I have reached the same conclusion in relation to her consideration of the certificate dated 24 November 2015 and agree with the basis for those conclusions.

End

of

reasons

²¹ *Wakaman* at [30].

²² *Wakaman* at [31]-[33].

²³ *Wakaman* at [32].

²⁴ *Wakaman* at [33].

²⁵ *Wakaman* at [34].

