

## REGISTRATION TEST

## REASONS FOR DECISION

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DELEGATE:                   Graham Miner

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Application Name:         Bar-Barrum People #2

Names of Applicants:     Brendan Roger Day, Agnes Celia Day, Darcy John Bradley Day, Tom  
Congoo, John Wason

Region:                    FNQ                                   NNTT No.:                QC01/17

Date Application Made:   27 April 2001        Federal Court No.:     QUD6015/01

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

## DECISION

The application is ACCEPTED for registration pursuant to s.190A of the *Native Title Act 1993* (Cwlth).

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Graham Miner

July 2005  
Date of Decision

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

## **Brief History of the Application**

The application was filed in the Federal Court, Queensland District Registry, on 27 April 2001. The application was made in response to a low impact exploration permit (application notice) issued pursuant to the *Mineral Resources Act 1989 (Qld)*. The application was considered and accepted for registration pursuant to s.190A of the *Native Title Act* on 28 May 2001.

A notice of motion to amend, together with an amended application, was filed in the Federal Court on 1 October 2001. On 11 October 2001, Deputy District Registrar Baldwin of the Federal Court granted leave to the applicants to amend the application.

The amendment of the application lodged on 1 October 2001, required the Registrar, or his delegate, to consider the amended application pursuant to the provisions of s. 190A (cf s.64(4) and s.190A(1)). The amended application was accepted for registration pursuant to s. 190A of the Native Title Act on 26 November 2002.

A notice of motion to amend, together with an amended application, was filed in the Federal Court on 2 March 2005. On 1 April 2005, Deputy District Registrar Connard of the Federal Court granted leave to the applicants to amend the application in accordance with the Amended Application attached as an exhibit to the affidavit of **[Legal representative – name deleted]** sworn 25 February 2005, incorporating the pages faxed to the Registry on 31 March 2005.

## **Information considered when making the Decision**

In making this decision I have considered and reviewed the original and amended applications, and all of the information and documents from the following files, databases and other sources:

- The National Native Title Tribunal's administration files, legal service files and registration testing files for QC01/17.
- The National Native Title Tribunal's Geospatial Analysis & Mapping Branch prepared a geospatial assessment and overlap analysis dated 27 April 2005.
- The Register of Native Title Claims and Schedule of Native Title Applications.
- The National Native Title Register.
- The amended application filed on 1 October 2001
- Federal Court order dated 11 October 2001
- The first registration test decision on the application dated 28 May 2001
- The National Native Title Tribunal's administration files, legal service files and registration testing files for the following Bar-Bar-Barrum applications: QC01/18, QC01/32, QC01/33, QC01/34, QC01/35.
- Letter from applicants' legal representative dated 12 March 2002.
- Letter from applicants' legal representative dated 31 October 2002.
- Preliminary Anthropological Assessment of the Bar-Barrum Native Title Claim by **[Anthropologists 1 & 2 – names deleted]** October 1997.
- The determination of native title made in relation to the Bar-Barrum People's application QC96/105 on 28 June 2001.

Copies of any material provided directly to the Registrar by the applicants in relation to my consideration of the application were provided to the State. The State did not provide any comments in relation to this material.

**Note:** Apart from the anthropological report listed above (considered at the request of the applicant), I have not considered any information and materials that may have been provided in the context of mediation of the group's native title application. This is due to the 'without prejudice' nature of mediation communications and the public interest in maintaining the inherently confidential nature of the mediation process.

All references to legislative sections refer to the *Native Title Act 1993* (Cth) unless otherwise specified. All references to 'the application' refer to the latest amended application referred to above unless otherwise specified.

### **Delegation Pursuant to Section 99 of the *Native Title Act 1993* (Cth)**

On 5 May 2005, Christopher Doepel, Native Title Registrar, delegated to members of the staff of the Tribunal including myself all of the powers given to the Registrar under sections 190, 190A, 190B, 190C and 190D of the *Native Title Act 1993* (Cwth).

The above delegation has not been revoked as at the date of the decision.

### **NOTE TO APPLICANT:**

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

Section 190B sets out the merit conditions of the registration test.

Section 190C sets out the procedural conditions of the registration test.

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

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## **A. Procedural Conditions**

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### **Applications contains details set out in s. 61 and s. 62: S190C(2)**

Section 190C(2) first asks the Registrar's delegate to test the application against the registration test conditions at sections 61 and 62. If the application meets all these conditions, then it passes the registration test at s190C(2).

## Native Title Claim Group: S. 61(1)

*The application is made by a person or persons authorised by all of the persons (the native title claim group) who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed, provided the person or persons are also included in the native title claim group.*

### Reasons relating to this sub-condition

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

I must consider whether the application sets out the native title claim group in the terms required by s. 61(1). That is one of the procedural requirements to be satisfied to secure registration: s. 190A(6)(b). If the description of the native title claim group *in the application* indicates that not all persons in the native title group are included, or that it is in fact a sub-group of the native title claim group, then the requirements of s. 190C(2) would not be met and the claim could not be accepted for registration (see *AG of Northern Territory v Doepel* [2003] FCA 1384 (*Doepel*) [at 36]).

This consideration does not involve me going beyond the information contained in the application and prescribed accompanying affidavits, and in particular does not require me to undertake some form of merit assessment of the material to determine whether I am satisfied that the native title claim group is in reality the correct native title claim group (*Doepel at paras 16 - 17, 37, 39*).

In light of *Doepel*, I have confined my considerations to the information contained in the application and accompanying affidavits.

The description of the persons in the native title claim group is found in Schedule A as follows:

‘The application is made on behalf of the Bar Barrum (BB) people, comprising the claim group comprising all descendants of the following apical ancestors.

**[Apical ancestors 1 – 12, – names deleted]**, including adoptees according to Bar Barrum traditional law & custom.’

I have considered the application in the light of the above statements of the Court and I am of the view there is nothing on the face of the description of the persons in the native title claim group, or elsewhere in the application, to indicate that not all the persons in the native title claim group are included in the description or that it is in fact a sub-group of the native title claim group for the area of the application.

I am satisfied that this description of the persons in the native title claim group meets the requirement in s. 61(1), as is imposed by s. 190C(2).

**Result: Requirements met**

**Name and address of service for applicants: S. 61(3)**

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

**Reasons relating to this condition**

The persons named as the applicant are identified and details of their address for service appears at Part B of the application.

**Result: Requirements met**

**Native Title Claim Group named/described sufficiently clearly: s. 61(4)**

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

Schedule A of the application describes the native title claim group. For the reasons that lead to my conclusions (below) that the requirements for s. 190B(3) have been met, I am satisfied that the persons in the native title claim group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.

**Application is in prescribed form: s. 61(5)**

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

**Reasons relating to this sub-condition**

**s. 61(5)(a)**

The application is substantially in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations 1998*.

**s.61(5)(b)**

The application was filed in the Federal Court as required pursuant to s. 61(5)(b) of the Act.

**s.61(5)(c)**

The application meets the requirements of s. 61(5)(c) and contains all information prescribed in s.62. I refer to my reasons in relation to those sections.

**s.61(5)(d)**

As required by s.61(5)(d) the application is accompanied by supporting affidavits as prescribed by s.62(1)(a) and a map (maps) as prescribed by s.62(2)(b). I refer to my reasons in relation to those sections of the Act.

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

**Result: Requirements met**

**Details required in section 62(1)**

*s.62(1)(a) Affidavits address matters required by s.62(1)(a)(i) – s.62(1)(a)(v)*

**Reasons relating to this sub-condition**

There are five persons named as the applicant. Each has sworn an affidavit that addresses the matters required by s. 62(1)(a)(i) to (iv). The affidavits are all dated, signed by each deponent and competently witnessed. The affidavits required by s. 62(1) refer to affidavits sworn by each of the applicants addressing the basis for authorisation as required by s. 62(1)(a)(v). These affidavits are provided at Attachment R of the amended application. These are copies of the affidavits provided with the original application. I am satisfied that these affidavits form part of the application as required by s. 61(5) and that these affidavits sufficiently address the matters required by s.62(1)(a)(v).

**Result: Requirements met**

*s.62(1)(c) Details of traditional physical connection (information not mandatory)*

**Comment on details provided**

At Schedule M the applicant provides details of traditional physical connection. The Schedule also refers to the affidavits of claim group members.

**Result: Provided**

**Application contains details set out in s. 62(2): s. 62(1)(b)**

Section 62(1)(b) asks the Registrar to make sure that the application contains the information required in s. 62(2). Because of this, the Registrar's decision for this condition is set out under s. 62(2) below.

**Details required in section 62(2) by section 62(1)(b)**

*s.62(2)(a)(i) Information identifying the boundaries of the area covered*

**Reasons relating to this condition**

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

**Result: Requirements met**

**Information about the boundaries of the application area: S. 62(2)(a)**

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

**Reasons relating to this condition**

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the information contained in the application is sufficient to enable the external boundaries of the claim area covered by the application to be identified.

See s. 190B(2) below

**Result: Requirements met**

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

**Reasons relating to this sub-condition**

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

**Result: Requirements met**

**Map of the application area: S. 62(2)(b)**

*The application contains two maps showing the external boundaries of the area covered by the application.*

**Reasons relating to this sub-condition**

For the reasons which led to my conclusion that the requirements of s.190B(2) have been met, I am satisfied that the maps contained in the application show the external boundaries of the claim area.

**Result: Requirements met**

**Details and results of searches: S. 62(2)(c)**

*The application contains details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land and waters in the area covered by the application*

**Reasons relating to this sub-condition**

Schedule D states that to the applicant's knowledge no such searches have been conducted. The applicant is only obliged to provide results and details of searches of which the applicant is aware.

**Result: Requirements met**

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

*The application contains a description of native title rights and interests claimed in relation to particular lands and waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and are all native title rights and interests that may exist, or that have not been extinguished, at law.*

**Reasons relating to this sub-condition**

Schedule E contains a description of the claimed native title rights and interests. The description does not amount to a mere assertion that the native title rights and interests are all the native title rights and interests that may exist, or that have not been extinguished at law. For the reasons given in my conclusion that the applicants have met the requirements of s. 190B(4), I am satisfied that the requirements of this section are met.

**Result: Requirements met**



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

- s. 62(2)(e) *The application contains a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:*
- (i) the native title claim group have, and the predecessors of those persons had, an association with the area; and*
  - (ii) there exist traditional laws and customs that give rise to the claimed native title; and*
  - (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs.*

### Reasons relating to this condition

The application contains a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist. Schedule F states:

The native title rights and interests claimed are those flowing from the traditional laws and customs of the Bar Barrum people which form part of a body of customary law which are part of a broader system of Aboriginal culture

The broader system denotes not just land law but a comprehensive body of law covering cultural values, norms of social behaviour and principles that govern the landed interests of the claim group

The acquisition of land interests is by descent from ancestors and derived from fundamental traditional rights of possession & ownership of land

The claim group asserts that

- (a) The native title claim group has, and predecessors of those persons had, an association with the claim area; and
- (b) There exist traditional laws and customs that give rise to native title rights and interests claimed; and (c) The native title claim group has continued to hold the native title in accordance with those traditional laws and customs

Examples of facts giving rise to the assertion of native title include

- i. Members of the claim group continue to have a close association, including a spiritual connection with the claim area according to their traditional law and custom
- ii. Members of the claim group continue to pass on to their descendants traditional laws & customs stories and beliefs concerning their traditional country including the claim area
- iii. Members of the claim group continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials

- iv. Members of the claim group continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessor~
- v. Members of the claim group continue to exercise a body of traditional laws and customs, which has been passed down to them from generation to generation by their forbears and predecessors; such traditions and customs include traditional laws & customs, which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country

Attachment F of the application consists of an affidavit sworn by one of the applicants, [**Applicant 4 – name deleted**] (15 August 2001). There is also another affidavit sworn by [**Applicant 4 – name deleted**] dated 10 February 2005 attached to the application. Information contained in Schedule G also provides a general description of the factual basis for the native title rights and interests claimed (refer also to my reasons for decision under s.190B(5)).

**s.62(2)(e)(i)**

See Schedule F above.

At Schedule G of the application the applicants describe a number of activities carried out by the Bar-Barrum on Bar-Barrum country, including gathering food, carrying out cultural and heritage protection and teaching Bar-Barrum children about Bar-Barrum culture. These activities are indicative of the groups association with the area.

The affidavits of [**Applicant 4 – name deleted**] attests to the existence of traditional laws and customs that give rise to the claimed native title. In his affidavits [**Applicant 4 – name deleted**] refers to his association with the area. He refers to spending time on country, hunting, fishing, gathering and caring for country. See:

- Affidavit of [**Applicant 4 – name deleted**] (15 August 2001) paras 8-19.
- Affidavit of [**Applicant 4 – name deleted**] (10 February 2005) paras 7-13.

**s.62(2)(e)(ii)**

The affidavits of [**Applicant 4 – name deleted**] attest to the existence of traditional laws and customs that give rise to the claimed native title. In his affidavits [**Applicant 4 – name deleted**] refers to traditional laws and customs relating to knowledge and use of bush medicine, hunting and fishing techniques, prohibitions against fishing in certain places, traditional dances, songs and ceremonies, and knowledge of traditional tribal boundaries, significant sites and the stories associated with them. He also refers to teaching traditional Bar-Barrum customs to Bar-Barrum children. See:

- Affidavit of [**Applicant 4 – name deleted**] (15 August 2001) paras 8-19
- Affidavit of [**Applicant 4 – name deleted**] (10 February 2005) paras 7-13.

At Schedule G of the application the applicants describe a number of activities carried out by the Bar-Barrum on Bar-Barrum country, including gathering food, carrying out cultural and heritage protection and teaching Bar-Barrum children about Bar-Barrum culture.

**s. 62(2)(e)(iii)**

The affidavit of [Applicant 4 – name deleted] supports the assertion that the native title claim group has continued to hold the native title in accordance with traditional laws and customs. Refer to my reasons under s.62(2)(e)(ii) above. In his affidavit (15 August 2001), [Applicant 4 – name deleted] deposes that he continues to care for country and carry out environmental and cultural management (para 16), and continues to pass on traditional laws and customs to his children and grandchildren; for example stories relating to significant sites, traditional dances and ceremonies and bushcraft (paras 11, 17, 18). Also in his affidavit dated 15 August 2001 he says that he routinely cares for Bar Barrum country by rehabilitating former mine sites, clearing creeks and the like (para 13).

At Schedule G of the application the applicants state that the Bar-Barrum are in continuous use and occupation of Bar-Barrum country, live on and visit Bar-Barrum country, gather food in country, carry out cultural and heritage protection on country and teach Bar-Barrum children about Bar-Barrum culture on country.

**Result: Requirements met**

**Activities carried out in application area: s. 62(2)(f)**

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

**Reasons relating to this condition**

At Schedule G of the application, the applicants provide details of activities currently carried out by members of the native title claim group in the claim area (see above). These include gathering food on country, working on country, carrying out cultural heritage protection on country and teaching Bar-Barrum children about Bar-Barrum culture on country. The native title claim group also asserts that they collect food resources and gather their livelihood from natural resources on Bar-Barrum country.

**Result: Requirements met**

**Details of other applications: S. 62(2)(g)**

*The application contains details of any other applications to the High Court, Federal Court or a recognised State/Territory body of which the applicant is aware, that have been made in relation to the whole or part of the area covered by the application and that seek a determination of native title or a determination of compensation in relation to native title;*

**Reasons relating to this condition**

Schedule H of the application states that the applicant is unaware of any other such application. In an assessment dated 27 April 2005, the Tribunal's Geospatial Analysis & Mapping Branch stated that no other claimant or non-claimant applications fall within the external boundaries of the current application.

**Result: Requirements met**

**Details of s. 29 notices: S. 62(2)(h)**

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

### **Reasons relating to this condition**

At Schedule I of the application the applicants sets out several s 29 notices of which they are aware. I take this to mean these are the only notices of which the applicant is aware.

I note that the Tribunal's Geospatial Analysis & Mapping Branch assessment dated 27 April 2005 lists seven (7) notices issued under s.29 of the Act (or under a corresponding provision of a law of the State or Territory) in relation to the whole or part of the application area as at 26 April 2005. I see that the notices listed are no longer current, the most recent being in December 2004. By *no longer current* I mean the four months after the notification day specified in the s29 notice, in which period the Registrar is required to use best endeavours to consider the claim, has expired

However, even if my above conclusion that the applicant is unaware of the additional notices is incorrect, I am of the view that Parliament's intention in relation to the requirements of s. 62(2)(h) is relatively clear. Both the note at the end of that paragraph, which states: "*Notices under s29 are relevant to subsection 190A(2)*", and also s. 190A(2) itself, make it reasonably clear that the purpose of the provision was to ensure that the Registrar was aware that the claim was affected by the relevant notice and, therefore, expedited the registration test of the application as required under s.190A(2). The Tribunal is of course aware of the notices and they are no longer current. I am of the opinion that in those circumstance it would be unduly harsh not accept an application for registration for not including details of notices of which the Tribunal is aware and which are no longer current.

I am satisfied that the application meets the requirements of this condition.

**Result: Requirements met**

**s.190C(2)**

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### **Reasons for Decision**

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

**Aggregate Result: Requirements met**

**Common claimants in overlapping claims: 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 the native title claim group for any previous application if:*

- (a) the previous application covered the whole or part of the area covered by the current application; and*
- (b) an entry relating to the claim in the previous application was on the Register of Native Title Claims when the current application was made; and*
- (c) the entry was made, or not removed, as a result of consideration of the previous application under section 190A.*

**Reasons for the Decision**

A search of the Geospatial database and Register of Native Title Claims reveals that there are no overlapping applications that cover the area of this application which are on the Register of Native Title Claims, as a result of a consideration pursuant to s. 190A. This was confirmed in the overlap analysis dated 27 April 2005 prepared by the Tribunal's Geospatial Analysis & Mapping Branch. This showed that there were no applications overlapping the area of the current application. Consequently, I need not consider this matter further.

I am satisfied that this application does not infringe the provisions of s.190C(3).

**Result: Requirements met**

**s. 190C(4)(a) or s. 190C(4)(b)**

*Certification and authorisation:*

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

- (a) the application has been certified under paragraph 202(4)(d) by each representative Aboriginal/Torres Strait Islander body that could certify the application in performing its functions under that Part: or*
- (b) the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.*

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

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

- (a) includes a statement to the effect that the requirement set out in paragraph (4)(b) has been met; and*
- (b) briefly set out the grounds on which the Registrar should consider that it has been met.*

## Reasons for the Decision

The application is not certified pursuant to s.190C(4)(a). Consequently I must be satisfied that the requirements of s.190C(4)(b) are met.

### *The applicants are members of the native title claim group*

The original and amended applications contain the following information relevant to whether the applicants are members of the native title claim group:

- Attachment R of original application – affidavits of the two original applicants stating that they are Bar-Barrum and the child of a named Bar-Barrum mother. In each case the applicants refer to ancestors that establish that they are descended from an ancestor named in Schedule A.
- Attachment R of amended application – affidavits of the three new applicants stating that they are Bar-Barrum and the child of a named Bar-Barrum parent. In his affidavit at Attachment R of the amended application, [**Applicant 3 – name deleted**] refers to his descent from an apical ancestor named in Schedule A of the application.

I am satisfied on the basis of this information that the persons named as the applicant are members of the Bar-Barrum native title claim group.

*Applicants 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.*

At Part A of the application states:

#### “AUTHORISATION

The applicants are entitled to make this application as:

Following an intense period of discussion, Bar Barrum (BB) people met on 16 December 2000 reaching consensus to prepare & lodge this native title application; at a 7 July 2001 meeting of BB people at Herberton, authorisation was reaffirmed & applicants amended

A further meeting of Aboriginal people asserting rights & interests in the areas in & surrounding the claim area was held at Dimbulah on 13 October 2004

This meeting was called by North Queensland Land Council (NQLC) in response to requests received from BB claim group members, with a view to confirming & authorising certain claim area reductions consequent upon a recent boundary agreement made with the neighbouring Jirrbal people to withdraw from certain disputed country

NQLC holds a computer database of BB persons' contact information; on 20 September 2004 a letter & notice was sent by post to each person on this database to inform them of the meeting & its subject matter

Further, prominent, double column newspaper advertisements were caused to be published notifying all BB people well in advance of the meeting & its subject matter.

NQLC staff also made contact in person & by telephone with a numerous persons claiming BB ancestry to confirm meeting details, travel & accommodation arrangements.

Authorisation meeting attendees, comprising representatives of claim group families asserting BB ancestry, were recorded by NQLC staff at about 12.30 pm, following which claim amendments were discussed & formally authorised, based on the draft of the Form 1 application earlier provided to participants.

Meeting participants claim group membership was based upon descent from the following apical ancestors: **[Apical ancestors 1 – 12, – names deleted]**, as set out in Schedule A below.

At this meeting the current applicants were confirmed & authorised in a manner consistent with the traditional law & custom of the members of the native title claim group to bring this application on behalf of the claim group

The applicants were likewise authorised by the native title claim group to deal on behalf of the claim group with matters arising in relation to the application

Minutes of the meeting were taken by NQLC staff, including recording of resolutions passed (all unanimously), motion movers & seconders

The list of meeting attendees was subsequently verified by Aboriginal administrative & project staff of NQLC against the claim group membership database maintained by NQLC.

The grounds for such assertions are set out in the affidavits of claim group members, applicants named above and **[NQLC staff member – name deleted]** in attendance at the authorisation meeting on 13 October 2004, all attached to this application & labelled Attachments R1 to R22

note - some original affidavits have been provided to the Court as part of earlier Bar Barrum applications.”

Information about authorisation is also found in the application at Schedule R – this, in turn, refers to the affidavits of **[NQLC staff member – name deleted]** and applicants at Attachment R.

**[NQLC staff member – name deleted]** deposed as follows in his affidavit made on 11 February 2005:

1. I am a project officer in the employ of the North Queensland Land Council Native Title Representative Body Aboriginal Corporation (NQLC).
2. While NQLC does not currently act on behalf of the Bar Barrum people (BB) in respect of this native title determination (claimant) application, we have recently provided facilitation and general assistance in respect of a boundary dispute between BB and the neighbouring Jirrbal people.

3. A meeting of the claim group for this application was held at Dimbulah Town Hall on 13 October 2004.
4. At the meeting, the claim group authorised certain amendments to be made to the application, primarily an amendment to reduce the area of the application.
5. The meeting was called by NQLC in response to requests for assistance received from current BB claim applicants and community members.
6. NQLC holds a computer database of BB persons' contact information. On 20 September 2004, I caused a letter and attached notice to send by post to each person on this database to inform them of the meeting details and its subject matter. Attached and marked "A" are true copies of these documents.
7. I am informed and believe to be true that NQLC staff did contact in person and by telephone a number of persons claiming BB ancestry to confirm meeting arrangements and offer assistance with travel and accommodation arrangements where needed.
8. I also caused to be published a prominent, double column advertisement in the 'public notices' section of the following newspapers, a copy of which is attached and marked "B"

Cairns Weekend Post on Saturday 2 October 2004

Tablelands Advertiser on Wednesday 6 October 2004

9. I attended this authorisation meeting together with [**Former NQLC legal officer – name deleted**] and [**Legal representative – name deleted**].
10. Circulated at the meeting was a written agenda and draft proposed resolutions, comprising business relating to the claim area changes and various sundry matters.
11. Authorisation meeting attendees, comprising representatives of claim group families asserting BB ancestry, were recorded by NUC staff at about 11:30 a.m. following which all claim amendments (based on the draft of the Form 1 Application provided to participants) were discussed and authorised.
12. The list of meeting attendees was subsequently verified by Aboriginal project staff of NQLC against claim group membership lists maintained by NQLC,
13. Meeting participants' claim group membership was based upon descent from the following apical ancestors: [**Apical ancestors 1 – 12, – names deleted**].
14. Minutes of the meeting were taken by NQLC staff, including recording of all resolutions passed, motion movers and seconders – all resolutions were passed unanimously.



15. I was present when, on the basis of BB law, custom and tradition elders and other meeting participants unanimously authorised the current applicants to make amendments to the application on behalf of BB people.

16. I was informed by the group and believe to be true that such authorisation occurred in a manner consistent with BB traditional law and custom, binding BB people as a whole,

All facts and circumstances herein deposed are within my knowledge save such as are deposed to from information only and my means of knowledge and source of information appear on the face of my affidavit.”

Copies of the attachments referred to in **[NQLC staff member – name deleted]** affidavit are with the application.

Each of the applicants has sworn an affidavit addressing the matters required by s.62 (s. 62 affidavits). The applicants’ s.62 affidavits state that they are authorised by all persons in the native title claim group to make the application and to deal with matters arising in relation to it.

Affidavits addressing the basis for authorisation sworn by the applicants, **[Applicant 3 – name deleted]**, **[Applicant 4 – name deleted]** and **[Applicant 5 – name deleted]**, are provided as attachments to the amended application. These are copies of the affidavits attached to the original application. Each of these affidavits states that the applicant is authorised by the Bar-Barrum People, through a traditional and customary decision-making process that must be complied with by the Bar-Barrum, to make the application.

The deponents explain the Bar-Barrum traditional and customary decision making process in the following terms:

- when the Bar-Barrum People want to make decisions about land business there is discussion amongst the Elders and talks with other members of the community
- this process results in a consensus being reached amongst the Elders and other senior members of the Bar-Barrum People that binds all members of the Bar-Barrum People, including those Bar-Barrum people who have been removed and have not been able to maintain their physical connection with country
- the process is a traditional decision-making process

In relation to authorisation of the original application, **[Applicant 3 – name deleted]** and **[Applicant 2 – name deleted]** state that the Bar-Barrum people have been talking about their native title and planning to progress their claims, as the need arises, since December 1996. According to their custom and tradition, they have met often to discuss these matters.

The affidavits also briefly set out how the Bar-Barrum People arrived at a decision to authorise the applicants to make this application, namely, intense community discussion during December 2000 amongst Bar-Barrum elders and other members of the community. This was followed by a meeting held in Herberton on 16 December 2000 at which a consensus was reached to prepare and lodge this new application. Each applicant swears that he/she and the other two applicants are authorised pursuant to this process, which found its voice in the discussions during December 2000 and

culminated in the Bar-Barrum community meeting on 16 December 2000, to make and deal with the application.

At Part A2 of the application (see above), the applicants also state that during December 2000 there was an intense period of discussion among the Bar-Barrum elders and other members of the community, and at a meeting in Herberton on 16 December 2000 consensus was reached to prepare and lodge the application. This authorisation was confirmed at the Bar-Barrum meeting in Herberton on 7 July 2001, when applicants were amended as well.

In relation to authorisation of the amended application the affidavits of **[Applicant 3 – name deleted]**, **[Applicant 4 – name deleted]** and **[Applicant 5 – name deleted]** at Attachment R state that they were authorised to be applicants in this native title application at a large meeting of Bar-Barrum people on 7 July 2001 in Herberton. The affidavit of **[Applicant 3 – name deleted]** deposes that the Bar-Barrum people reaffirmed their earlier authorisation for this application at this meeting, and that he was then authorised to be added as an applicant in this claim.

The s.62 affidavits of the original applicants, **[Applicant 2 – name deleted]** and **[Applicant 1 – name deleted]**, provided with the amended application, do not specifically state that their authorisation was confirmed at the meeting in Herberton on 7 July 2001, they refer to their affidavits at Schedule R of the original application. However, on the basis of the information at Schedule A2 of the amended application and the affidavit of **[Applicant 3 – name deleted]**, I am satisfied that this was the case.

Further information on the authorisation meeting held on 7 July 2001 was provided by the applicants' legal representative in a letter dated 12 March 2002. He states that the authorisation meeting on 7 July 2001 was a large meeting held after the determination, for the purposes of authorising the ILUA's entered into in the course of the determination and the new native title applications. The meeting was advertised in relation to the ILUA's and the new applications had been discussed at a number of previous Bar-Barrum meetings. Around 50 Bar-Barrum people attended the meeting and the minutes and attendance sheets are held by the Bar-Barrum Aboriginal Corporation, the Registered Native Title Body Corporate. The new native title applications were authorised at this meeting. In a letter dated 30 October 2002, the applicants' legal representative explained why there are different combinations of applicants in each of the six new Bar-Barrum applications. He stated that different Bar-Barrum families assert closer affiliation with some estates within Bar-Barrum country than others and wanted to be representatives on applications in relation to certain areas only. For example, the **[Family 1 – name deleted]** asserts a closer relationship to the Mt Garnett area (Bar-Barrum applications #2 and #3); while **[Family 2 – name deleted]** assert a closer relationship to the Petford area (Bar-Barrum applications #4 and #6). An assertion of closer relationships by certain families to areas within Bar-Barrum country is consistent with Bar-Barrum traditional laws and customs.

In relation to this amended application a further meeting of Aboriginal people asserting rights and interests in the areas in and surrounding the claim area was held at Dimbulah on 13 October 2004. This meeting was called by North Queensland Land Council (NQLC) and they hold a computer database of Bar Barrum persons' contact information and on 20 September 2004 they sent a letter

and notice by post to each person on this database to inform them of the meeting and its subject matter, details attached to this application. (Please see [NQLC staff member – name deleted] affidavit 11 February 2005 above)

Further, [Applicant 4 – name deleted] deposed in his affidavit made 10 February 2005 as follows:

- “1. I am an elder of the Bar Barrum People and as such have the authority to speak on behalf of Bar Barrum People.
2. On 7 July 2001 there was a meeting of Bar Barrum People held in Herberton. I attended the meeting. The purpose of the meeting was to authorise the making of certain applications for determination of native title, including this application.
3. The meeting was attended by numerous Bar Barrum People, including elders representing the various family groups which make up the Bar Barrum People. In accordance with our traditional law and custom, each of the elders is authorised, to talk about and make decisions about land business upon behalf of his or her family group. We discussed the issues and reached a consensus about a decision. The decision will then bind all members of the Bar Barrum People. This is our traditional decision making process, and it was the process which was followed at the meeting on 7 July 2001.
4. As a result of our traditional decision making process, at the meeting on 7 July 2001 the Bar Barrum People authorised this application to be made by the people who are named as applicants in the proceeding, including myself
5. Since this application was made, the applicants have been trying to move forward with it with the intention of achieving a determination of native title. One of the issues which we as applicants have had to deal with has been an overlap of area with an adjoining claim. A further meeting of Bar Barrum People was called to make some amendments to the application to change the claim area to avoid areas, where there was an overlap with an adjoining claim. That meeting was held in Dimbulah on 13 October 2004 ("the October meeting"). I attended the October meeting.
6. There was a good attendance of Bar Barrum People at the October meeting. Again, the meeting was held and discussion took place in accordance with the traditional decision making process which I described previously. A consensus was reached and decisions were taken to amend the application amended as per [Deponent 1 – name deleted] affidavit.”

[Deponent 1 – name deleted] affidavit (14 February 2005) is in similar terms to that of [Applicant 4 – name deleted] and supports the conclusion that the persons named as the applicant have been appropriately authorised.

As a result of the information discussed above, I am satisfied that the Bar-Barrum people have a traditional and customary decision making process that must be followed in matters of this kind, and that the applicants are so authorised by that process. It follows that I am satisfied that the persons

named as the applicant have been properly authorised and continue to be authorised as required by s. 190C(4)(b) of the Act.

**Result: Requirements met**

## **B. Merits Conditions**

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

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

### **Reasons for the Decision**

#### *External Boundaries*

The claim area is located in North Queensland, within the Local Government areas of Mareeba and Herberton. The written description of the external boundary is found at Schedule B of the application. This written description is supplemented by a map showing the external boundary of the application area. Schedule C of the amended application, filed on 2 March 2005, refers to a map attached to the application. There are in fact two maps attached to the application. Both have been prepared by the Tribunal's Geospatial Unit. They are dated 8 October 2005.

The written description at Attachment B (prepared by the Tribunal's Geospatial Unit and dated 21 October 2005) adequately describes the claim area.

The map identifies the area described in Attachment B with lot/plan numbers and includes scale, north point and geographic co-ordinates. I am satisfied that the lot/plan references listed in Attachment B and on the map enables these parcels to be identified and located, according to the State of Queensland's land and tenure records. I am also satisfied that the written description and map satisfactorily locate the external boundaries of the claim area on the earth's surface, allowing the claim area to be identified with reasonable certainty. This was confirmed by the assessment prepared by the Tribunal's Geospatial Unit on 27 April 2005.

### *Internal boundaries*

The internal boundaries are described in Schedule B of the application. These boundaries are described by a formula that excludes a variety of tenure classes from the claim area. This includes each of the interests or tenures set out in s.23B of the Act (which deals with previous exclusive possession acts).

I am satisfied that the written description satisfactorily locates the internal boundaries of the claim area on the earth's surface, allowing the claim area to be identified with reasonable certainty. In this regard I have taken into account the comments of Nicholson J in *Daniels and Ors, et al v The State of Western Australia* [1999] FCA 686. I refer specifically to para. 32 of Nicholson J's judgment in which he states:

“These requirements are to be applied to the state of knowledge of an applicant as it could be expected to be at the time the application or amendment is made. Consequently a class or formula approach could satisfy the requirements of the paragraphs where it was the appropriate specification of detail in those circumstances. For example, at the time of an initial application when the applicants had no tenure information it may be satisfactory compliance with the statutory requirement.”

In my view, the information provided enables the internal boundaries of the claim area to be adequately identified. This may require research of tenure and geographic/topographic information or data held by the State of Queensland, but it is reasonable to expect that the task can be done on the basis of the information provided by the applicants.

**Result: Requirements met**

### **Identification of the native title claim group: 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.*

### **Reasons for the Decision**

The application does not name all the persons in the native title claim group. As a result, it is necessary for the application to meet the requirements of s. 190B(3)(b). In order to meet this condition of the registration test, the description of the group must be sufficiently clear so that it can be ascertained whether any particular person is a member of the native title claim group.

The description of the persons in the group is found at Schedule A of the application. The membership of the group is said to be the Bar-Barrum people, who are descendants of the named Bar-Barrum apical ancestors including adoptees according to Bar Barrum traditional law and custom. As noted in my reasons under s. 61(1) above, I am satisfied that all the persons encompassed

in the list in the first Bar-Barrum determination are included in the native title claim group description of the current application.

In *State of Western Australia v Native Title Registrar* [1999] FCA 1591-1594, Carr J said that “[i]t may be necessary, on occasions, to engage in some factual inquiry when ascertaining whether any particular person is in the group as described. But that does not mean that the group has not been described sufficiently....The Act is clearly remedial in character and should be construed beneficially.” I note that a description of the native title claim group in terms of named apical ancestors and their descendants is acceptable under s.190B(3)(b), even though these descendants are not always named, and some factual inquiry would need to be made in these instances to determine if any one person is a member of the group.

Attachment A describes the principles of Bar Barrum adoption.

Consequently, I am satisfied that the descendants of the named persons (having regard to the ancestors named in Schedule A) and adopted persons could be identified with minimal inquiry and as such, ascertained as part of the native title claim group. By referencing the identification of members of the native title claim group as descendants of named ancestors and adopted persons, it is possible to objectively verify the identity of members of the native title claim group, such that it can be clearly ascertained whether any particular person is in the group.

I am therefore satisfied that the condition in s.190B(3)(b) is met.

**Result: Requirements met**

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

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

### **Reasons for the Decision**

Schedule E of the application states:

1. In relation to land where there has been no prior extinguishment of native title or where s. 238 (the non-extinguishment principle) applies, the native title rights & interests claimed comprise the right to possession, occupation, use and enjoyment of the claim area as against the whole world pursuant to the traditional law & custom of the claim group, but subject to the valid laws of the Commonwealth of Australia & the State of Queensland.
2. There are five further groups or categories of non - exclusive rights and interests (or specific activities in exercise of the core right to use and enjoyment of the land and waters) that can be described in the following terms:

- A Discharge cultural, spiritual traditional & customary rights, duties, obligations and responsibilities on. in relation to & concerning the native title land & its welfare, by acting to:
  - a preserve sites of significance to native title holders & other Aboriginal people on the native title land
  - b determine, give effect to, pass on and expand the knowledge & appreciation of their culture & traditions
  - c regard the native title land as part of the attachment of the native title holders to the native title land & ensure that the use of the native title land is consistent with that attachment
  - d maintain the cosmological relationship, beliefs, practices & institutions through ceremony and proper & appropriate custodianship of the native title land and special and sacred sites, to ensure the continued vitality of culture, and the well-being of the native title holders
  - e inherit, dispose of or confer native title rights & interests in relation to the native title land on other in accordance with traditional law & custom
  - f conduct secular, ritual & cultural activities on the native title land
  - g conduct burials
  - h construct & maintain structures for the purpose of exercising native title
  - i determine who are the native title holders & resolve disputes in relation to the native title land
  
- B
  - a reside on the native title land
  - b camp on the native title land
  - c establish residences the native title land
  - d. travel across the native title land
  
- C Determine use rights in relation to activities which may be carried out by others on the native title land, including the right to grant, deny or impose conditions in relation to activities which may be carried out on the native title land
  
- D
  - a exercise & carry out economic life (including by way of barter) on the native title land
  - b hunt, fish & carry out activities on the native title land
  - c create, grow, produce on the native title land
  - d husband on the native title land
  - e harvest & exchange natural resources on the native title land
  
- E Have access to, use and dispose of the cultural\* resources of the native title land, by acting to
  - i maintain & use the native title land
  - ii conserve the cultural resources of the native title land
  - iii safeguard & protect the cultural resources of the native title land for the benefit of the native title holders
  - iv manage & care for the native title land for the benefit of the native title holders

v use the native title land & its cultural resources for social, cultural, economic, religious, spiritual, customary & traditional purposes

\* To avoid doubt, references to cultural resources means natural resources of the land which are used by the claim group for sustenance, ceremonial, medicinal or other traditional purposes.

3 The applicants claim the rights and interests referred to in paragraph 2 as incidents and examples of the broader, general right claimed in paragraph 1, where that right exists.”

At Schedule L, the applicants state that the Bar Barrum people continue to occupy all USL (unallocated State Land), Aboriginal Reserves and State land within in the claim area.

The rights and interests claimed are further qualified by the following statements:

1. The native title claim group does not claim ownership of minerals, petroleum, or gas wholly owned by the Crown: Schedule Q.
2. The applicants do not claim exclusive possession over any offshore place: Schedule P

#### *The requirements of the Act*

Section 190B(4) requires the Registrar or his delegate to be satisfied that the description contained in the application of the claimed native title rights and interests is sufficient to allow the rights and interests to be readily identified. For the purposes of the condition, then, only the description contained in the application can be considered.<sup>1</sup>

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

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

Section 223(1) reads as follows:

"The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

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<sup>1</sup> *Queensland v Hutchinson* (2001) 108 FCR 575.



- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia'.

Some interests which may be claimed in an application may not be native title rights and interests and are not 'readily identifiable' for the purposes of s.190B(4). These are rights and interests which the courts have found to fall outside the scope of s. 223. Rights which are not readily identifiable include:

- the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,<sup>2</sup>
- rights to minerals and petroleum under relevant Queensland legislation,<sup>3</sup>
- an exclusive right to fish offshore or in tidal waters, and
- any native title right to exclusive possession offshore or in tidal waters.<sup>4</sup>

I have considered the description of native title rights and interests in the present application in light of previous judicial findings. As a result, I am satisfied that the rights and interests claimed by the applicants in Schedule E are native title rights and interests and that the description is sufficient to allow the native title rights and interests claimed to be readily identified.

**Result: Requirements met**

#### **Factual basis for claimed native title: S190B(5)**

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

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

#### **Reasons for the Decision**

For satisfaction of s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s. 62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. Regard will be had to the application as a whole; subject to s190A(3), regard may also be had to relevant information that is not contained in the application. The provision of material disclosing a factual basis for the claimed native title rights and interests is the responsibility of the applicant. It is

<sup>2</sup> *Western Australia v Ward* (2002) 191 ALR 1, para [59]

<sup>3</sup> *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.

<sup>4</sup> *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

not a requirement that the Registrar (or his delegate) undertake a search for this material: *Martin v Native Title Registrar* per French J at [23].

In *Queensland v Hutchinson* (2001) 108 FCR 575, Kiefel J said that “[s]ection 190B(5) may require more than [s62(2)(e)], for the Registrar is required to be satisfied that the factual basis asserted is sufficient to support the assertion. This tends to assert a wider consideration of the evidence itself, and not of some summary of it.” For each native title right or interest claimed, there should be some factual material that demonstrates the existence of the traditional law and custom of the native title claim group that gives rise to the right or interest.<sup>5</sup>

In essence, I must be satisfied, pursuant to s.190B(5), that a sufficient factual basis is provided to support the assertion that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided is sufficient to support those assertions that:

- the native title claim group have, and their predecessors had, an association with the area claimed;
- the traditional laws and customs, acknowledged and observed by the native title group exist, and
- the native title claim group continue to hold native title in accordance with those traditional laws and customs.

Material which addresses the requirements of s. 190B(5) is contained in Schedules F, G and M. A general description of the factual basis on which it asserted that the three criteria identified at s.190B5(a) - (c) are met is provided in Schedule F of the application. This in turn refers to the attached affidavits of the applicants. These are included with the original application. Schedule G provides details of activities currently carried out within the claim area. Schedule M briefly outlines the traditional physical connection of members of the claim group to the area claimed and refers to further details in the attached affidavits of claim group members.

Pursuant to s. 190A(3) of the Act, regard may also be had to relevant information that is not contained in the application. Consequently, I have had regard to the Preliminary Anthropological Assessment of the Bar-Barrum Native Title Claim (QC96/105) by [**Anthropologists 1 & 2 – names deleted**] (dated October 1997). Given the proximity of the area claimed in that application to the area claimed in the current application and the fact that much of the information in the report refers to broader Bar-Barrum country, I am of the view that it is appropriate to consider this information as relevant to the current application. That the information contained in the report relates to Bar-Barrum people in general and Bar-Barrum country at large was confirmed by the applicant’s then legal representative in a letter dated 12 March 2002. In that letter, the legal representative for the applicants also confirmed that consideration was to be had to the report in relation to the s. 190B(5) condition of the registration test:

'the Bar-Barrum applicants have instructed that the Registrar may make reference to the Connection report of [**Anthropologist 2 - name deleted**] that is held by the NNTT from the time of the first consent determination, for the purposes of registration and to the affidavits and affidavits filed in Schedules F and L of the first determination as they are relevant to the broader use and enjoyment of the domain area by the Bar-Barrum'.

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<sup>5</sup> See *Western Australia v Ward* (2002) 191 ALR (*Ward*) at [382].

This report provides further information regarding the association of the Bar-Barrum with the claim area, the traditional laws and customs from which the native title rights and interests claimed derive, and the relationship between those traditional laws and customs and the native title rights and interests claimed.

It is not the role of the delegate to reach definitive conclusions about complex anthropological issues pertaining to applicants' relationships with country subject to native title claimant applications. What I must do is consider whether the factual basis provided by the applicants is sufficient to support the assertion that claimed native title rights and interests exist. In particular this material must support the assertions noted in s.190B(5) (a), (b) and (c). I have formed the view that the information in the application and the additional information referred to above provides sufficient probative detail to address each element of this condition. I will now deal in turn with each of these elements.

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

Schedule F refers to the affidavits of the applicants attached to the application. One of those applicants is **[Applicant 4 – name deleted]**. There are two affidavits made by **[Applicant 4 – name deleted]** attached: 15 August and 10 February 2005. The year of the 15 August affidavit is not stated but is probably 2001. I have, and will continue to use that date to identify the affidavit.

The factual basis provided in the affidavits of **[Applicant 4 – name deleted]** is sufficient to support an assertion that the Bar-Barrum People have an association with the claim area and are descended from people who also had an association with the claim area. The deponent provides examples of his association and the association of his parents, uncles, grandchildren, and other relatives with the area claimed. See:

- Affidavit of **[Applicant 4 – name deleted]** (15 August 2001) paras 4-9, 11-13, 15-19;
- Affidavit of **[Applicant 4 – name deleted]** (10 February 2005) paras 7-13.

At Schedule G of the application (see above) the applicants state that Bar-Barrum people live on and visit Bar-Barrum country, gather food on Bar Barrum country and carry out cultural and heritage protection on country.

The anthropological assessment prepared by **[Anthropologists 1 & 2 – names deleted]** outlines the anthropological, archaeological, and linguistic evidence for the association of the Bar-Barrum people with the claim area (pp. 23-28). Due to the isolated and rugged terrain inhabited by the Bar-Barrum, there is little reference to the Bar-Barrum in nineteenth - and early twentieth century literature. Nevertheless, more recent research unanimously holds that the Bar-Barrum people were and are the sole indigenous inhabitants of that country located about the Great Dividing Range west of Atherton, with a distinctive language and a kinship system in common with that of other groups in the Cape York Peninsula. The authors refer to the work of Roth on the unique Bar-Barrum language, and to the work of Sharp on the social organisation of the tribes of north-east Australia (1939).

The above research suggests that the domain claimed by the Bar-Barrum is well accepted by neighbouring groups as being legitimate (pp. 32-36). The authors conducted interviews and field trips with members of the native title group and documented their knowledge of significant sites in the claim area. They also describe how the Bar-Barrum have maintained a continuing connection with their traditional domain, through 'scratch mining' of wolfram and tin in the more rugged areas and employment on cattle stations (p. 23).

Having regard to the information contained in the application and the additional material referred to above, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group have, and the predecessors of those persons had, an association with the area subject to this application.

**(b) existence of traditional laws acknowledged by, and traditional customs observed by, the native title claim group**

Schedule E describes those rights and interests which are said to derive from and be exercisable by reason of the existence of native title. The applicants also assert recognition and observance of traditional laws and customs in relation to the land.

As outlined under my reasons for s. 62(2)(e)(ii), the affidavits of [**Applicant 4 – name deleted**] referred to at Schedule F refers to traditional laws and customs relating to knowledge and use of bush medicine, hunting and fishing techniques, traditional dances, songs and ceremonies, knowledge of traditional tribal boundaries, significant sites and the stories associated with them. The affidavit also refers to teaching traditional Bar-Barrum customs to Bar-Barrum children and to behaviours that must be observed at particular special sites. Refer:

- Affidavit of [**Applicant 4 – name deleted**] (15 August 2001) paras 7-19;
- Affidavit of [**Applicant 4 – name deleted**] (10 February 2005) paras 7-13.

Schedule G lists details of activities in regard to traditional usage of their country to support these traditional laws and customs. These activities include:

- living on country (ie, camping, occupying and visiting);
- hunting gathering food on country;
- preserving sites;
- holding ceremonies on and use of traditional country;
- carrying out cultural and heritage protection on country;
- teaching Bar-Barrum children about Bar-Barrum history and culture on country;

The anthropological assessment prepared by [**Anthropologists 1 & 2 – names deleted**] describes some of the traditional laws and customs of the Bar-Barrum from which the claimed native title rights and interests derive (pp. 44-53, 62-69). These include:

- The traditional kinship system under which various families are attached to and have responsibility for specific areas within the Bar-Barrum domain. This is a Kariera type system common to the Cape York Peninsula.

- Rules of patrilineal succession similar to those observed by other groups in the Cape York Peninsula. From these proprietary rules flow the rights and responsibilities to preserve significant sites, care for country and manage and conserve its resources.
- Marriage patterns based on the traditional Kariera type kinship system.
- A system of governance based on the authority of male elders as custodians of traditional knowledge relating to country, significant sites and resources. From this system and body of traditional knowledge flow the rights to hunt, fish, carry out economic life, resolve disputes, and to pass on their knowledge on to the younger generation. Elders also retain contemporary knowledge of the history of family connections, intermarriage, occupations, and residence.
- The ongoing transmission of cultural knowledge relating to the availability of food resources and raw materials, hunting and gathering techniques and manufacture of tools and artefacts, that derives from customary practice.

Having regard to the information contained in the application, and the additional material referred to above, I am satisfied that there is a sufficient factual basis to support an assertion that traditional laws and customs exist; that those laws and customs are respectively acknowledged and observed by the native title claim group, and that those laws and customs give rise to the claim to native title rights and interests.

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

Assertions of the continued observation of traditional laws and customs from which the native title rights and interests claimed are said to derive is provided as follows.

- In his affidavits referred to above [**Applicant 4 – name deleted**] deposes that he continues to collect firewood and timber and other forest products in the claim area to make tools and artefacts, and for food; that he and his family and other Bar-Barrum families continue to camp and occupy country under claim; and that he runs programs on country to teach Aboriginal children about Bar-Barrum culture and bush-craft.
- Activities conducted by the native title claim group on the lands and waters of the claim area pursuant to traditional laws and customs are found at Schedule G.
- In the report of [**Anthropologists 1 & 2 – names deleted**] the authors outline modifications to traditional Bar-Barrum kinship systems, systems of governance and rules of succession that have occurred since European contact, and clearly identify the roots of contemporary practices in traditional laws and customs. They also document the ongoing transmission of cultural knowledge relating to the availability of food resources and raw materials, hunting and gathering techniques and manufacture of tools and artefacts.

Having regard to the information contained in the application and the additional material referred to above, I am satisfied that there is a sufficient factual basis to support an assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs.

**Conclusion**

Taking the above matters into consideration, I am satisfied that the factual basis provided sufficiently supports the assertions outlined in s. 190B(5) (a) – (c).

I am 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.

**Result: Requirements met**

**Native title rights and interests claimed established prima facie: S. 190B(6)**

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

### **Reasons for the Decision**

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

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

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

I have adopted the ordinary meaning referred to by their Honours in considering this application, and in deciding which native title rights and interests claimed can be established *prima facie*.

I add that the meaning of *prima facie* was recently considered in and approved in *Northern Territory v Doepel* [2003] FCA 1384, see paras 134 -135. Briefly, the Court concluded that although the above case was decided before the 1998 amendments of the Act there is no reason to consider the ordinary usage of ‘prima facie’ there adopted is no longer appropriate.

I have noted already the description of native title rights and interests claimed by the applicants under my reasons for decision for s. 190B(4) of the registration test.

Whilst it is not completely clear, I am of the view that at Schedule L the applicants claim the benefit of s. 47B in relation to all vacant crown land (or unallocated State Land) in the application area, and the benefit of s. 47A in relation to an Aboriginal Reserves.

The rights and interests claimed are further qualified by the following statements:

The native title claim group does not claim ownership of minerals, petroleum, or gas wholly owned by the Crown: Schedule Q.

The applicants do not claim exclusive possession over any offshore place: Schedule P

The applicants claim the *exclusive* right to possess, occupy, use, and enjoy lands and waters in accordance with and subject to their traditional laws and customs, and the force and operation of laws of the Commonwealth and the State in relation to land where there has been no prior extinguishment of native title or where s. 238 (the non-extinguishment principle) applies. The applicants then list five groups of native title rights and interests which are claimed non-exclusively. These are listed under s. 190B(4) above.

Turning now to a consideration of whether the native title rights and interests claimed can be *prima facie* established:

*1. In relation to land where there has been no prior extinguishment of native title or where s. 238 (the non-extinguishment principle) applies, the native title rights & interests claimed comprise the right to possession, occupation, use and enjoyment of the claim area as against the whole world pursuant to the traditional law & custom of the claim group, but subject to the valid laws of the Commonwealth of Australia & the State of Queensland.*

## **Established**

Subject to the satisfaction of other requirements, the majority of the High Court in *Western Australia v Ward* (2002) 191 ALR 1 indicated that a claim to exclusive possession, occupation, use and enjoyment of lands and waters can be *prima facie* established.<sup>6</sup>

However, the Court indicated that such a claim may only be able to be established *prima facie* in relation to some parts of a claim area, such as those areas where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (for example, where the applicants claim the benefit of ss.47, 47A or 47B). The applicant has recognised this in respect of the areas where the above composite right is claimed.

I add that over areas where a claim to exclusive possession cannot be sustained (i.e., where the claim is non-exclusive in nature), the Court has indicated that a claim to ‘possession, occupation, use and enjoyment’ of the land and waters cannot be *prima facie* established. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that “it will seldom be appropriate or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms”: at [51].<sup>7</sup> Similarly, in *De Rose v South Australia* [2002] FCA 1342, O’Loughlin J said that such a description was “inappropriate”: at [919].<sup>8</sup> It would seem, then, that without further investigation, a non-exclusive right to possession, occupation, use and enjoyment is not capable of being established *prima facie*.

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<sup>6</sup> At [51].

<sup>7</sup> Refer also *Ward*, [48], [52], [53] and [89].

<sup>8</sup> Refer also *De Rose*, [918]-[920]

In light of the comments of the majority of the High Court in *Ward* and of O’Loughlin J in *De Rose*, it appears that a non-exclusive right to possession, occupation, use and enjoyment *cannot*, on the face of it, be established pursuant to s. 190B(6).

I will now consider whether the native title rights and interests claimed at para. 1. can be prima facie established.

Schedule F states in part that:

“Examples of facts giving rise to the assertion of native title include

- i. Members of the claim group continue to have a close association, including a spiritual connection with the claim area according to their traditional law and custom
  - ii. Members of the claim group continue to pass on to their descendants traditional laws & customs stories and beliefs concerning their traditional country including the claim area
  - iii. Members of the claim group continue to use the claim area for traditional hunting and fishing and for the gathering of traditional bush medicines and other materials
  - iv. Members of the claim group continue to care for their traditional country, including the claim area, in accordance with traditional laws and customs passed down to them by their forebears and predecessor.
  - v. Members of the claim group continue to exercise a body of traditional laws and customs, which has been passed down to them from generation to generation by their forebears and predecessors; such traditions and customs include traditional laws & customs, which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country

The attached affidavits of applicants provide examples & further details”

Schedule G says that:

“Claim group members continue to exercise a body of traditional law & custom passed down from generation to generation by their forebears and predecessors

Such tradition & custom includes

- a gathering, hunting & fishing in the claim area
- b controlling access to, speaking & caring for country
- c the holding of ceremonies on & use of traditional country
- d camping & occupying country, visiting & protecting & preserving special sites and story places, and
- e participation in consultation processes & land use decision-making in relation to third parties



Bar Barrum children & youth are taken to country to learn about their history & culture; claim group members also access their land to maintain & supplement their livelihoods”

The affidavits made by the persons named as the applicant that are required by s. 62(1)(a) of the Act, state that the contents of the application are true.

Further, [**Applicant 4 – name deleted**] affidavit made on or about 15 August 2001 supports the existence of this claimed right. He says:

- “1. I was born in 1932.
2. I am a tourist guide and cultural consultant.
3. My father, [**Apical ancestor 13 – name deleted**], was a Bar-Barrum man.
- 4 I take my identity as a Bar-Barrum man from my father.
5. I used to live with my parents on the Bar-Barrum side of the Wild River in Herberton in what was called the “one mile camp”. This was an Aboriginal encampment outside Herberton.
6. When I was eight years old my parents moved to Woolaman Creek in Bar-Barrum country in the Silver Valley area.
7. Later I lived near the junction of the Dry and Wild rivers, an area currently in my application.
8. I used to go hunting with my father and uncle. There were plenty of Kangaroos and possums and other animals to eat at that time. We needed the bush tucker as we didn't have much money.
9. My uncle and father and other relatives taught me about bush medicine, such as how the sap of the pencil orchid cures cuts and bruises.
10. My two uncles and my father taught me dances that were traditional Bar-Barrum ceremonies. My father used to sing songs in Bar-Barrum language.
- 11 I have taught these dances to my grandsons who perform them these days at the Bar-Barrum outstation and other location in Bar-Barrum country.
12. With my family I used to go "Scratch mining" and I have continued to do so all my life, throughout Bar-Barrum country. I used to have a scratch mine by a spring that was a traditional Bar-Barrum, camping area, later the spring was dammed. I continue to visit this area with my grand son. The area is south of Irvinebank in the area under claim.
13. I collect firewood and timber to make tools and artefacts in country.

14. I was shown how to make fish traps to catch fish in the rivers by my father and uncles to feed our family, and the tree leaves that stun the fish and make them easy to catch.
15. My family and I and other Bar-Barrum families and my grand sons continue to camp in and occupy country under claim.
16. I have been involved in cultural heritage work in the claim area and have worked extensively with the Department of Environment & Heritage. In this way I have cared for country and been involved in environmental and cultural management.
17. I have run programs sponsored by Commonwealth Government agencies to bring Aboriginal children on to Bar-Barrum country to explain culturally significant sites and ways and to teach bushcrafts.
18. I was shown culturally significant sites by my father and uncles when I was growing up. I have passed on stories to my grandsons and also the locations of these sites, which are very important to Bar-Barrum people.
19. There are special sites that Bar-Barrum people must talk to the spirits before we go there.
20. I collect wood for fires and building and forest products for artefacts and food in Bar-Barrum country to this day.
21. I lived at Emu Creek and raised my family in that area, I also used to live around Irvinebank and visited Bar Barrum people in Watsonsville and right up near Atherton.
22. I currently live in Dimbulah, in Bar Barrum country.
23. I am working now in the Watsonville and in the Herberton State Forest area.
24. All the facts and circumstances deposed to are within my own knowledge, save such as are deposed to from information only, and my means of knowledge and sources of information appear on this the face of my affidavit.”

Also, [**Applicant 4 – name deleted**] further affidavit made 10 February 2005 supports the existence of this claimed right:

- “7. I have lived and worked on or near the claim area all my life. I have worked on Bar Barrum country as a miner, both as an employee and for myself, as well as working as a timber cutter and an employee for Shire Councils.
8. I feel a strong spiritual connection to Bar Barrum country, including the claim area. I have maintained this connection all my life.

9. In recent times I estimate that I have spent about 75% of my time residing on or camping on Bar Barrum country. I regularly make fish traps, hunt, fish and gather bush tucker and medicines from Bar Barrum country. I also show others how to do so.
10. Much of my time over the past decade or more has been invested in passing on knowledge about Bar Barrum country to young people, including conduction training for traditional owner rangers (currently approximately 12 trained up and active) or taking young people onto Bar Barrum country as part of TAFE studies, Court diversion and other government or community projects.
11. I am familiar with all our story places, sacred and significant sites on our country, including the hot springs area near the junction of Nettles Creek and the Herbert River, parts of Mowbray Creek, Dry River, Women's sites, border grounds and corroboree places, massacre locations, poison water and our initiation places.
12. The knowledge which I have about these places has been with the Bar Barrum People for a long time. It was passed on to me as part of our traditional process. As I am now an elder of the Bar Barrum People, it is part of my role to pass on knowledge of our country to younger Bar Barrum People when they are ready. I do this regularly.
13. I routinely care for Bar Barrum country by rehabilitating former mine sites, clearing creeks and the like.

I also refer to the information to which I have referred under s. 190B(5) above in the report of **[Anthropologists 1 & 2 – names deleted]**

All the above information supports the native title claim group occupying, using and enjoying the area claimed. I am consequently satisfied that the right claimed can be prima facie established in relation to those areas.

I will now consider whether the native title rights and interests claimed in paragraph 2. can be prima facie established. Unless otherwise indicated, if native title rights and interests are said to be established they are established in respect of the whole claim area.

*2. There are five further groups or categories of non - exclusive rights and interests (or specific activities in exercise of the core right to use and enjoyment of the land and waters) that can be described in the following terms:*

*A Discharge cultural, spiritual traditional & customary rights, duties, obligations and responsibilities on, in relation to & concerning the native title land & its welfare, by acting to:*

*a preserve sites of significance to native title holders & other Aboriginal people on the native title land.*

**Established**

Schedule G provides information relating to the claimants carrying out cultural heritage protection work on country. See

- d camping and occupying country, visiting, protecting & preserving special sites and story places, and
- e participation in consultation processes & land use decision-making in relation to third parties

In his affidavit made 15 August 2001, [**Applicant 4 – name deleted**] deposes to involvement in cultural heritage work in the claim area and working with the Department of Environment and Heritage (para 16, but more generally 16-19). He also refers to passing on the knowledge of these sites and the stories relating to them to his grandsons and other young people and the importance of observing appropriate behaviour at these sites (paras 17-19).

In the anthropological assessment of the Bar Barrum people's application the authors note that none of the songs and dances associated with mythology has survived. However the Bar Barrum continue to observe site-relevant constraints on behaviour and also ask others to observe them (p. 69).

[**Applicant 4 – name deleted**] also speaks in his affidavit made 10 February 2005 of his knowledge of story places, sacred and significant sites (para. 11) and also says that he routinely cares for Bar Barrum country by rehabilitating former mine sites, clearing creeks and the like (para 13).

*b determine, give effect to, pass on and expand the knowledge & appreciation of their culture & traditions*

### **Established**

At Schedule G of the application the applicants state that the Bar Barrum people teach Bar-Barrum children about Bar-Barrum culture on country (see final para).

The affidavits of [**Applicant 4 – name deleted**] provides evidence for the transmission of cultural knowledge directly related to the use of the land: for example, observance of customary rules when fishing, learning usages for fauna and flora on country for medicinal purposes, visiting significant places and passing on of knowledge between the generations about culturally significant places on country. See:

- Affidavit of [**Applicant 4 – name deleted**] (15 August 2001), paras 8-9, 10-11, 14, 16-18;
- Affidavit of [**Applicant 4 – name deleted**] (10 February 2005), paras 11 - 12.

In the anthropological assessment of the Bar Barrum people's application, the authors describe how the current attachment of various Bar Barrum families to particular areas within the Bar-Barrum domain reflects the traditional system of clan estates, passed down through traditional rules of patrilineal succession. They document the changes in social structure and governance that have occurred, so that the contemporary Bar Barrum may derive their rights to Bar Barrum country through their mother or their father. The authors also document how knowledge of the seasonal availability of resources is passed down from generation to generation (for example from grandfather

to grandson in the **[Family 3 – name deleted]**), where certain species can be found and *hunting* and gathering techniques. They also describe how one of the claim group members, **[Applicant 4 – name deleted]**, is involved in teaching young people about bush foods and the medicinal uses of plants at cultural and first offender camps held in the Emuford property.

*c regard the native title land as part of the attachment of the native title holders to the native title land & ensure that the use of the native title land is consistent with that attachment*

### **Established**

I refer to the information under b. above.

I also refer to the contents of Schedule F, in particular to:

“v. Members of the claim group continue to exercise a body of traditional laws and customs, which has been passed down to them from generation to generation by their forbears and predecessors; such traditions and customs include traditional laws & customs, which deal with caring for country, controlling access to country, the holding of ceremonies on traditional country and the use of traditional country.”

I am of the view that the report of **[Anthropologists 1 & 2 – names deleted]** referred to above, and **[Applicant 4 – name deleted]** affidavits set out above, support the prima facie establishment of this right.

*d maintain the cosmological relationship, beliefs, practices & institutions through ceremony and proper & appropriate custodianship of the native title land and special and sacred sites, to ensure the continued vitality of culture, and the well-being of the native title holders*

### **Established**

I refer to the information described under c). above. Based on the same information I am of the opinion this claimed right and interest can be prima facie established.

*e inherit, dispose of or confer native title rights & interests in relation to the native title land on other in accordance with traditional law & custom*

### **Established**

At Schedule G of the application the applicants state that the Bar Barrum people teach Bar-Barrum children about Bar-Barrum culture on country (see final para).

The affidavits of **[Applicant 4 – name deleted]** provides evidence for the transmission of cultural knowledge directly related to the use of the land: for example, observance of customary rules when fishing, learning usages for fauna and flora on country for medicinal purposes, visiting significant places and passing on of knowledge between the generations about culturally significant places on country. See:

- Affidavit of [Applicant 4 – name deleted] (15 August 2001) - paras 8-9, 10-11, 14, 16-18;
- Affidavit of [Applicant 4 – name deleted] (10 February 2005), paras 11 - 12.

In the anthropological assessment of the Bar Barrum people's application, the authors describe how the current attachment of various Bar-Barrum families to particular areas within the Bar-Barrum domain reflects the traditional system of clan estates, passed down through traditional rules of patrilineal succession. They document the changes in social structure and governance that have occurred, so that the contemporary Bar-Barrum may derive their rights to Bar-Barrum country through their mother or their father. The authors also document how knowledge of the seasonal availability of resources is passed down from generation to generation (for example from grandfather to grandson in the [Family 3 – name deleted]), where certain species can be found and hunting and gathering techniques. They also describe how one of the claim group members, [Applicant 4 – name deleted], is involved in teaching young people about bush foods and the medicinal uses of plants at cultural and first offender camps held in the Emuford property.

*f conduct secular, ritual & cultural activities on the native title land*

#### **Established**

Schedule G outlines information concerning activities of the above nature on the area claimed, e.g. hunting, fishing gathering, conducting ceremonies and visiting and protecting special sites. This is supported by the affidavits of [Applicant 4 – name deleted] referred to above.

*g conduct burials*

#### **Not Established**

I have been unable to find sufficient information to support the prima facie establishment of this right.

I refer to s. 190(3A) of the Act. This section permits an applicant to provide additional information to the Registrar in support of any rights and interests that were not registered when the application was tested and accepted for registration. In brief, provided that additional information satisfies the Registrar (or his delegate) that, had it been before him at the time of testing, the right would have been accepted for registration, then, subject to meeting the other conditions of the test, the right in question will be entered in the Register of Native Title Claims.

*h construct & maintain structures for the purpose of exercising native title*

#### **Established**

In Schedule G, the applicants state that the Bar-Barrum People camp, hunt gather and fish in the area. They also say they speak for and visit Bar-Barrum country. In his affidavit, dated 15 August 2001, [Applicant 4 – name deleted] speaks of camping on and occupying the country under claim (paras 5-7, 15). He also deposes that he lived and raised his family at Emu Creek and currently lives in Dimbulah, in Bar-Barrum Country (paras 21-22). I note also the statement in Schedule L of the

application that at the time of filing this application the Bar-Barrum people occupied and continue to occupy all vacant crown land (unallocated State land) in this application and an Aboriginal Reserve at Herberton.

The anthropological assessment of the Bar Barrum people's application referred to above records ample evidence of the residence of members of the native title claim group in the claim area. The authors conducted field work and obtained detailed information about the location of residences and the history of occupation of Bar Barrum families in the area, notably the **[Family 3 – name deleted]** and **[Family 4 – name deleted]**.

The right to construct and maintain structures for the purpose of exercising native title seem to me to be consistent with, and part of, the activities outlined. In respect of areas where exclusive possession cannot be sustained there is nothing in the description of this right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. I note that elsewhere in the application the right to "establish residences on the native title land" is claimed (para B c.).

*i determine who are the native title holders & resolve disputes in relation to the native title land*

#### **Established**

The affidavits regarding authorisation indicate that membership of the group is determined through traditional law and custom. There appears to be no discretion to deviate from these rules. Thus, the native title claim group is only able to determine who are the native title holders within their group and resolve disputes in relation to the native title land in accordance with traditional law and custom.

In the affidavits, the applicants state how they derive their Bar-Barrum identity through their father or through their mother. The statements in the affidavits illustrate the development of rules of succession from the traditional patrilineal model throughout the Cape York Peninsula region. In the anthropological assessment of the Bar Barrum people's application, the authors describe how the Bar Barrum now acknowledge a less strict mode of succession, either through the male or female line. Nevertheless this appears to be based on tradition and custom. This less strict mode of succession is largely a result of conflict during the early contact period, when large numbers of men were killed and Bar Barrum women provided the necessary continuity into the present (p. 49).

The material in the affidavits and in the anthropological report supports the prima facie establishment of this right.

**B** *a reside on the native title land*

#### **Established**

A question arises here whether the right claimed necessarily amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession cannot be sustained. In

respect of areas where exclusive possession cannot be sustained there is nothing in the description of this right which conveys to me an intention or capacity on the part of the members of the native title claim group to control access to or use of those areas. I note that elsewhere in the application the right to "establish residences on the native title land" is claimed (see para B c. below).

I refer to the information under Para A h. above. Based on that I am satisfied that there is sufficient information available to prima facie establish this native title right and interest. For instance Schedule G refers to the group camping & occupying country, visiting & protecting & preserving special sites and story places (para d). This is supported by [**Applicant 4 – name deleted**] who says in his affidavit of 10 February 2005:

7. I have lived and worked on or near the claim area all my life. I have worked on Bar Barrum country as a miner, both as an employee and for myself, as well as working as a timber cutter and an employee for Shire Councils.
8. I feel a strong spiritual connection to Bar Barrum country, including the claim area. I have maintained this connection all my life.
9. In recent times I estimate that I have spent about 75% of my time residing on or camping on Bar Barrum country. I regularly make fish traps, hunt, fish and gather bush tucker and medicines from Bar Barrum country. I also show others how to do so.

I am satisfied this right can be prima facie established.

*b camp on the native title land*

**Established.**

I refer to the information under para A h. above. Based on that information I am satisfied that there is sufficient information available to prima facie establish this native title right and interest.

*c establish residences the native title land*

**Established**

Insofar as the applicants claim the right to establish 'residences' on the claim area, a question arises as to whether such a right necessarily amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right would not be prima facie capable of being established over areas for which a claim to exclusive possession cannot be sustained.

In response to a query from the Tribunal in relation to this point, the then legal representative for the applicants has stated that "[t]he applicants assert the rights in question as between the Bar Barrum people who maintain strong cultural and traditional ties to their land and their customary laws. These rights are not asserted vis a vis non-Bar Barrum people in tenures where there are other interest holders. The Bar Barrum recognise the rights of coexisting tenure holders where appropriate and don't presume to control other interest holder's rights" (letter dated 31 October 2001).



In light of these comments, I am of the opinion that the right to establish residences on the claim area does not amount to a right to control access to, or use of, the claim area. That said, there is sufficient information in Schedule G, in the affidavits to which I have referred, and in the anthropological report to satisfy me that this right can be prima facie established.

It is stated in Schedule G of the application that the Bar Barrum People camp, occupy and visit Bar Barrum country and are in continuous use and occupation of that country. [**Applicant 4 – name deleted**] in his affidavits dated 15 August 2001 and 10 February 2005 tells of camping on and occupying country under claim (see above). I note also the statements in Schedule L of the application that the Bar Barrum people continue to occupy the USL land claimed in the application and the Aboriginal reserves located in the claim area.

The anthropological assessment of the Bar Barrum people's application records ample evidence of the residence of members of the native title claim group in the claim area; the authors conducted extensive field work and obtained detailed information about the location of residences and the history of occupation of Bar Barrum families in the area, notably the [**Family 3 – name deleted**] and [**Family 4 – name deleted**].

*d travel across the native title land*

#### **Established**

I refer to Schedule G ( paras a – d.) and the affidavits of [**Applicant 4 – name deleted**] set out above.

I am satisfied there is sufficient information available to support the prima facie establishment this claimed right.

*C Determine use rights in relation to activities which may be carried out by others on the native title land, including the right to grant, deny or impose conditions in relation to activities which may be carried out on the native title land*

#### **Established but only in respect of areas where exclusive possession can be sustained.**

Over areas where a claim to exclusive possession cannot be sustained, the majority in *Ward* (Gleeson CJ, Gaudron, Gummow and Hayne JJ) questioned the appropriateness of claims to control access to and use of the land: at [52]. *Ward* is authority for the proposition that rights which amount to a right to control access to the land or a right to control the use to which it is put, are not capable of registration where a claim to exclusive possession cannot be sustained.

A question arises here whether the right claimed necessarily amounts to a right to control access to and use of the claim area. To the extent that it would do so, such a right is not *prima facie* capable of being established over areas for which a claim to exclusive possession cannot be sustained. In my opinion it amounts to such a

claim. Hence the claim can only be established over areas for which a claim to exclusive possession **can** be sustained.

Schedule F states that:

v. Members of the claim group continue to exercise a body of traditional laws and customs, which has been passed down to them from generation to generation by their forbears and predecessors; such traditions and customs include traditional laws & customs, *which deal with caring for country, controlling access to country*, the holding of ceremonies on traditional country and the use of traditional country. (italics added)

Schedule G speaks of the group:

- c controlling access to, speaking & caring for country;
- d camping & occupying country, visiting & protecting & preserving special sites and story places, and
- e participation in consultation processes & land use decision-making in relation to third parties.

I refer to the information in the report of [**Anthropologists 1 & 2 – names deleted**] to which I have referred above.

[**Applicant 4 – name deleted**] says in his affidavit of 15 August 2001 that:

I have been involved in cultural heritage work in the claim area and have worked extensively with the Department of Environment & Heritage. In this way I have cared for country and been involved in environmental and cultural management (para 16).

I am satisfied there is sufficient information available to prima facie establish this claimed right in respect of areas where exclusive possession can be sustained.

D      a      *exercise & carry out economic life (including by way of barter) on the native title land*

### **Established**

I am satisfied that the terminology '*carry out economic life . . . on* [emphasis added] *the native title land*' makes it clear that the right relates to activities on the claim area that are not divorced from physical presence on the land. I am of the view that this right is clearly grounded in and carried out on country and for traditional purposes. I note in this regard reference to the right being carried out on the area involved. The use of the term "*barter*" further supports an interpretation that this right does not extend beyond trade in traditional resources, if read in conjunction with the evidence produced by the applicants in support of this right (refer below). That the application does not claim a right to trade in non-traditional resources is further supported by the statement in Schedule Q that the group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

The affidavit of [**Applicant 4 – name deleted**] (15 August 2001) states that he and his family hunted, fished and foraged for bush foods, bush medicine, timber and firewood, and conducted mining activities on the land (paras 8-9, 12-14, 19). There are similar statements in his affidavit of 10

February 2005. At Schedule G of the application, the applicants state that the Bar-Barrum people collect food resources and gather their livelihood from natural resources on Bar Barrum country.

In the anthropological assessment of the Bar Barrum people's application, the authors document how knowledge of the seasonal availability of resources (where certain species can be found and hunting and gathering techniques), is passed down from generation to generation, for example from grandfather to grandson in the [Family 3 – name deleted]. They also describe how a member of the native title claim group, [Applicant 4 – name deleted], is involved in teaching young people about bush foods and the medicinal uses of plants at cultural and first offender camps held in the Emuford property.

b *hunt, fish & carry out activities on the native title land*

**Established**

I refer to the information in Schedule G and in the affidavits of [Applicant 4 – name deleted].

I am satisfied there is sufficient information available to prima facie establish this claimed right.

c *create, grow, produce on the native title land*

d *husband on the native title land*

**Not Established**

I am unable to find sufficient information to support the prima facie establishment of these two claimed rights.

I refer to the provisions of s. 190(3A) which I have outlined above.

e *harvest & exchange natural resources on the native title land*

**Established**

Based on the same information and for the same reasons as appear under para D a above I am satisfied there is sufficient information available to prima facie establish this claimed right.

In considering the following claims in para E I have had regard to the definition of "cultural resources" set out in Schedule E and repeated below.

E *Have access to, use and dispose of the cultural\* resources of the native title land, by acting to*

i *maintain & use the native title land;*

ii *conserve the cultural resources of the native title land;*

iii *safeguard & protect the cultural resources of the native title land for the benefit of the native title holders;*

iv *manage & care for the native title land for the benefit of the native title holders;*

v *use the native title land & its cultural resources for social, cultural, economic, religious, spiritual, customary & traditional purposes.*

\* *To avoid doubt, references to cultural resources means natural resources of the land which are used by the claim group for sustenance, ceremonial, medicinal or other traditional purposes.*

The native title rights at subparagraphs E i-v is expressed in such a way that they appear to specify the content of the general right expressed in para. E. A question which arises here for consideration is whether rights to 'maintain', 'conserve', 'safeguard' and 'manage' necessarily imply a right to control the access to, and use of, land in areas where a claim to non-exclusive possession cannot be sustained. Were this so, these rights would not be capable of registration in respect of areas where exclusive possession cannot be sustained. Again, I have had reference to a letter (dated 31 October 2002) from the applicant's then legal representative in relation to the rights and interests claimed by the applicants. The representative states that the rights are "as between the Bar Barrum and who maintain strong cultural and traditional ties to their land and their customary laws" and that "the Bar-Barrum recognise the rights of co-existing tenure holders and don't presume to control other interests holders rights" In addition, I note that right E only speaks in terms of having access to, use of and disposal of the *cultural resources*. That term is defined to mean "*natural resources of the land which are used by the claim group for sustenance, ceremonial, medicinal or other traditional purposes*". I am satisfied that the rights expressed in E and E(i)-(v) are rights which do not presume a right of control and which are capable of being established prima facie.

I further note that these rights do not include a right to ownership of minerals, petroleum or gas wholly owned by the Crown (Schedule Q); nor do they extend to offshore places (Schedule P).

There is evidence to support the prima facie establishment of these rights in the affidavits of [**Applicant 4 – name deleted**], at Schedule G of the application and in the anthropological assessment of the Bar Barrum people's application. Refer to my reasons for decision above and as follows.

i *maintain & use the native title land*

#### **Established**

I am satisfied there is sufficient information available in Schedule G and the affidavits of [**Applicant 4 – name deleted**], to support the prima facie establishment of this right.

ii *conserve the cultural resources of the native title land*

#### **Established**

I am satisfied there is sufficient information to support the prima facie establishment of this claimed right to conserve the cultural resources of the land. Schedule G refers to the group speaking for country and caring for country. In my opinion cultural resources as defined are an integral part of country. I also refer to [**Applicant 4 – name deleted**], affidavit of 15 August 2001 in which he states that he has been involved in caring for country and involved in environmental and cultural management (para 16),

iii *safeguard & protect the cultural resources of the native title land for the benefit of the native title holders*

### **Established**

This right is similar to that in ii above. I see that in *Mary Yarmirr v Northern Territory* [1998] 1185 FCA, the Court accepted a right to maintain and protect places of cultural importance over an area where a claim to exclusive possession was not available. The right claimed here appear similar to that right except that the present right relates to cultural resources as defined. In my opinion such resources can be seen as closely related to places of cultural importance. For these reason, the rights appear to be capable of being *prima facie* established over such areas.

Based on the same information as referred to under ii above, I am satisfied there sufficient information to support the prima facie establishment of this claimed right to safeguard and protect the cultural resources of the land.

iv *manage & care for the native title land for the benefit of the native title holders*

### **Established**

This right is akin to that claimed at *i* above to maintain the native title land.

I am satisfied there is sufficient information available in Schedule G and the affidavits of [Applicant 4 – name deleted] to support the prima facie establishment of this right.

v *use the native title land & its cultural resources for social, cultural, economic, religious, spiritual, customary & traditional purposes*

### **Established**

I am satisfied there is sufficient information available in Schedule G and the affidavits of [Applicant 4 – name deleted] to support the prima facie establishment of this right.

At Schedule G of the application the applicants state that the Bar Barrum people collect food resources and gather their livelihood from natural resources on Bar Barrum country, and teach Bar Barrum children about Bar Barrum culture on country.

In his affidavit (15 August 2001) [Applicant 4 – name deleted] refers to a range of economic activities carried out in the claim area. He deposes that he and his family hunt, fish, gather bush tucker and medicine, firewood, timber and other forest products and make tools and artefacts in the claim area (paras 8-9, 13-15, 20). He also refers to religious and cultural activities such as traditional dancing, paying respect to spirits at significant sites and teaching young people about Bar-Barrum culture on country (paras 10, 11, 17, 19). There is also information in his affidavit of 10 February 2005 that supports the establishment of this right.

### **Conclusion**

As I need only be satisfied that some of the claimed rights and interests are established, the requirements of s.190B(6) are met.

**Result: Requirements met**

### **Traditional physical connection: S. 190B(7)**

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

- (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or*
- (b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to the land or waters) by:*
  - (i) the Crown in any capacity; or*
  - (ii) a statutory authority of the Crown in any capacity; or*
  - (iii) any holder of a lease over any of the land or waters, or any person acting on*

### **Reasons for the Decision**

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

I refer to the contents of Schedule G set out above. The activities referred to indicate that the claim group has a traditional physical connection with at least part of the land or waters covered by the application.

Also, Schedule M states:

“Details of any traditional physical connection with any of the land or waters covered by the application by any member of the native title claim group:

Residing in the vicinity of the claim area, many members of the native title claim group continue to, amongst other things, visit the claim area, exercise their native title rights by caring for their country, camping, gathering, hunting, fishing & passing on their traditional knowledge, law & custom.

The native title claim group's traditional law & custom provide that within the group there may be certain individuals, families or sub-groups which will have sometimes stronger and sometimes lesser rights & responsibilities in relation to particular parts of the claim area; the nature & incidents of such differentiation is determined in accordance with Bar Barrum traditional law & custom.

Further details are contained in attached affidavits of claim group members.”

I refer to the affidavits of [Applicant 4 – name deleted] providing information:

- that he is a Bar-Barrum person;
- that he takes his identity as a Bar-Barrum man from his father;
- that he grew up on the Bar-Barrum side of the Wild river, and lives near the junction of the Wild and Dry rivers, within the claim area:
- about how he hunts, fishes, and collects bush tucker and bush medicine in the claim area;
- that he was taught traditional stories by his elders, and was shown culturally significant sites;
- how he collects firewood and timber to make tools and artefacts in the claim area;
- that he was taught by his elders about Bar-Barrum customs.

I am satisfied that [Applicant 4 – name deleted] is a member of the native title claim group. [Applicant 4 – name deleted] provides information to support the assertion that he has a traditional physical association and connection with the claim area that is continuous and is current. I am satisfied the requirements of the section are met.

**Result: Requirements met**

**No failure to comply with s. 61A: S. 190B(8)**

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

Section 61A contains four sub-conditions. Because s. 190B(8) asks the Registrar to test the application against s. 61A, the decision below considers the application against each of these four sub-conditions.

### **Reasons for the Decision**

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

#### **S. 61A(1) Native Title Determination**

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

#### **S. 61A(2) Previous Exclusive Possession Acts**

In Schedule B of the application, any area that is covered by the categories of previous exclusive possession acts defined in s. 23B of the *Native Title Act*, is excluded from the claim area. I am therefore satisfied that the claim is not made over any such areas.

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

The applicants state in the final paragraph of Schedule B that they do not claim exclusive possession over areas covered by previous non-exclusive possession acts (s. 23F).

**S.61A(4) - s.47, 47A 47B**

At Schedule L the applicants claim the benefit of s. 47B in relation to vacant crown land (unallocated State land) in the claim area, and the benefit of s. 47A in relation to the Aboriginal reserve at Herberton.

**Conclusion**

For the reasons as set out above I am satisfied that the application and accompanying documents do not disclose and it is not otherwise apparent that pursuant to s. 61A the application should not have been made.

**Result: Requirements met**

**No claim to ownership of Crown minerals, gas or petroleum: S. 190B(9)(a)**

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

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

**Reasons for the Decision**

The applicants state at Schedule Q of the application that the native title claim group do not claim ownership of minerals, petroleum or gas wholly owned by the Crown.

**Result: Requirements met**

**No exclusive claim to offshore places: S. 190B(9)(b)**

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

- (b) *to the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and*

**Reasons for the Decision**

The applicants state at Schedule P of the application that this is not applicable. The application does not include an offshore place.



**Result: Requirements met**

**Native title not otherwise extinguished: S. 190B(9)(c)**

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

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

**Reasons for the Decision**

The application does not disclose and I am not otherwise aware of any other extinguishment of native title rights and interests in the area claimed. I am satisfied that the requirements of this section have been met.

**Result: Requirements met**

*End of Document*