

National Native Title Tribunal

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Susan Walsh

Application Name: Bar-Barrum People

Names of Applicants: Mr Brendan Roger Day, Ms Agnes Cecilia Day, Mr William John Gordon

Region: FNQ NNTT No.: QC01/17

Date Application Made: 27 April 2001 Federal Court No.: Q6015/01

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).

Susan Walsh

28 May 2001
Date of Decision

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

Brief History of the Application

This application was filed in the Federal Court, Queensland District Registry, on 27 April 2001. The application has been made in response to a low impact exploration permit (application notice) issued pursuant to the *Mineral Resources Act 1989 (Qld)*.

Information considered when making the Decision

In determining this application I have considered and reviewed the application 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 Database.
- The Register of Native Title Claims and Schedule of Native Title Applications.
- The National Native Title Register.

All references to legislative sections refer to the Native Title Act 1993 unless otherwise specified.

A. Procedural Conditions

s.190C(2)

Information, etc., required by section 61 and section 62:

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

Details required in section 61

s.61(1) The native title claim group includes all the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed.

Reasons relating to this sub-condition

At Schedule A of the application it is stated that the native title application is made on behalf of the Bar-Barrum people, being the descendants of a number of listed apical ancestors. Schedule A lists those named ancestors.

I do not have any other information that indicates that this group does not include, or may not include, all the persons who hold native title in the area of the application. I am satisfied that the group described includes all the persons who, according to their traditional laws and customs, hold the native title claimed.

Result: Requirements met

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

Reasons relating to this sub-condition

The names of the applicants are detailed in Part A. The address for service appears at the end of the application.

Result: Requirements met

s.61(4) *Names the persons in the native title claim group or otherwise describes the persons so that it can be ascertained whether any particular person is one of those persons*

Reasons relating to this sub-condition

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.

Result: Requirements met

s.61(5) *Application is in the prescribed form, lodged with the Federal Court, contains prescribed information, and is accompanied by any prescribed documents*

Reasons relating to this sub-condition

The application is in the form prescribed by Regulation 5(1)(a) of the *Native Title (Federal Court) Regulations* 1998. The application was filed in the Federal Court as required pursuant to s.61(5)(b) of the Act.

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. 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 three applicants. Each applicant has sworn two affidavits that collectively contain the matters required by s62(1)(a) – see the three affidavits at attachment “R” of the application.

The affidavits are all dated, signed by each deponent and competently witnessed. I am satisfied that the affidavits sufficiently address the matters required by s62(1)(a)(i)-(v).

Result: Requirements met

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

Comment on details provided

Details relating to traditional physical connection are found in the affidavits of applicant ‘**name deleted**’ (25/4/01) and claim group members ‘**name deleted**’ (26/4/01) and ‘**name deleted**’ (27/4/01) at attachment F of the application.

Result: Provided

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 sub-condition

For the reasons which led to my conclusion that the requirements of s190B(2) have been met, I am satisfied that the information in the application are sufficient to enable the area covered by the application to be identified.

Result: Requirements met

s.62(2)(a)(ii) Information identifying any areas within those boundaries which are not covered by the application

Reasons relating to this sub-condition

For the reasons which led to my conclusion that the requirements of s190B(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

s.62(2)(b) A map 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 s190B(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

s.62(2)(c) Details/results of searches carried out by the applicant to determine the existence of any non-native title rights and interests

Reasons relating to this sub-condition

At schedule D of the application the applicants state that no searches have been conducted. There is no indication in the material that is before me that the applicant has conducted any searches requiring disclosure in the application.

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule E contains an adequate 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 s190B(4) I am also satisfied that the requirements of this section are met.

Result: Requirements met

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 sub-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. The 'general description' required by this section is found in the application at Schedule F which in turn refers to the 3 affidavits by members of the native title claim group, at Attachment "F" and also in schedule G.

Result: Requirements met

s.62(2)(f) If native title claim group currently carry on any activities in relation to the area claimed, details of those activities

Reasons relating to this sub-condition

Schedule G contains a statement that Bar-Barrum people live on and visit Bar-Barrum country as well as gathering food, working, teaching culture, collecting food and natural resources, and carrying out cultural and heritage protection work on country. The statement also sets out that Bar-Barrum People maintain their spiritual connection with Bar-Barrum country.

This is a sufficient level of details of the activities carried out by the native title claim group on the claim area.

Result: Requirements met

s.62(2)(g) Details of any other application to the High Court, Federal Court or a recognised State/Territory body the applicant is aware of (and where the application seeks a determination of native title or compensation)

Reasons relating to this sub-condition

Schedule H states that this section is ‘not applicable’ which I am satisfied means that as far as the Applicants are aware, there are no such applications or determinations.

Result: Requirements met

s.62(2)(h) Details of any s.29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of

Reasons relating to this sub-condition

s.62(2)(h) Details of any s.29 notices given pursuant to the amended Act (or notices given under a corresponding State/Territory law) in relation to the area, which the applicant is aware of

Reasons relating to this sub-condition

It is stated in Schedule I that ‘Kagara has issued a notice’.

The application does not contain any other detail relating to this notice, nor does it contain a copy of the notice. The applicants’ legal representative has however, provided a copy of a notice directly to the Registrar. This document is a notice of intention to make an application for a low impact exploration permit pursuant to s486 of the *Mineral Resources Act 1989* (Qld).

Section 62(2)(h) requires that the application contain details of any notices issued under s29 of the *Native Title Act 1993* (Cth) (or under a corresponding [emphasis added] provision of a law of a State or Territory). It is my view that when s62(2)(h) talks of "corresponding" legislation, it is referring to something that is "analogous" or "equivalent": see the definition of "corresponding" in the new shorter Oxford dictionary.

I am of the view that on a literal reading of s62(2)(h), this means a notice issued under legislation enacted pursuant to s 43 of the *Native Title Act*. The Kagara notice relates to activity that corresponds or is equivalent to s26A of the Act

It is not therefore necessary to provide details of the Kagara notice in the application, as it is not, strictly speaking, a notice covered by the provisions of s62(2)(h).

Result: Requirements met

s.190C(2)

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&62.

Aggregate Result: Requirements met

s.190C(3)

Common claimants in overlapping claims:

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

This application was filed in the Federal Court on 27 April 2001 and for the purposes of s190C(3)(b) it was "made" on that day.

A search of the Geospatial database and Register of Native Title Claims reveals that there were 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 s190A.

I am therefore satisfied that this application does not offend 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 s190C(4)(a). Consequently I must be satisfied that the requirements of s190C(4)(b) are met.

First Limb – the applicants are members of the native title claim group

The application contains the following information relevant to this first limb of s190C4(b):

- Attachment R – affidavits of the three applicants stating that they are Bar-Barrum and the child of a named Bar-Barrum mother. In each case the applicants refer to antecedents that establishes that they are descended from an ancestor named in schedule A.

I am satisfied on the basis of this information in the application that the applicants are members of the Bar-Barrum native title claim group. The above recited information amounts to the statement required by s190C5(a) and the brief setting out of the grounds required by s190C5(b), in relation to this first limb of s190C4(b).

Second Limb - 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.

Information about authorisation is found in the application at Schedule R – this, in turn, refers to the affidavits of the applicants at attachment R.

The applicants' s62 affidavits all 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.

They state that the basis for this authorisation is further set out in their affidavits in Attachment “R”.

Each of the applicants’ affidavits at Attachment “R” states that they are 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 each explain the Bar-Barrum traditional and customary decision making process, namely:

- 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 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.

It is stated by each deponent 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 set out a brief outline of how the Bar-Barrum People arrived at a decision to authorise the applicants to make this new 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 ‘**place & date deleted**’ at which a consensus was reached to prepare and lodge this new application. Each applicant swears that he/she and the other 2 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 ‘**date deleted**’, to make and deal with the application.

The information in the attachment R affidavits amount to the requisite statements under s190C5(a) and (b).

On the basis of this information, 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. I am also satisfied that the applicants are so authorised by that process, as a result of the discussions and meetings that are described in the affidavits.

Result: Requirements met

B. Merits Conditions

s.190B(2)

Description of the areas claimed:

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 and 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 for the external boundary is found in Schedule B of the application. The written description is supplemented by a map showing the external boundary - see schedule C which refers to a map attached to the application and the map that accompanied the application referred to the Native Title Registrar by the Federal Court under s63 entitled "Barr-Barrum #2".

The written description defines the claim area as being comprised of a number of parcels of land (385 in total), each described with a lot and plan number, and listed in schedule B under 7 regional area headings.

The map is A3 in size, and contains a series of coordinate references. The claim area is outlined in black. The map is drawn to a scale.

The map identifies the location of 33 of the parcels described in schedule B with a lot/plan number. The remaining parcels are not individually shown, but would appear, from a reading of schedule B to be situated in Coolgarra and Mt Garnett. The location of these two towns or localities is depicted on the claim map. I see from schedule B that the total geographic area under claim is 35.9sq km. It would seem clear then that the remaining parcels not individually shown on the map, are too small and in too concentrated an area, to be depicted on this map with further particularity. I am however satisfied that the shaded areas on the map marked 'see Mt Garnett' and 'see Coolgarra' shows the location of the remaining parcels. I am also satisfied that the lot/plan references in schedule B under the headings "Mt Garnett" and "Coolgarra" enables these parcels to be identified and located, according to the State of Queensland's land/tenure records.

The written description and map appears to me to satisfactorily locate the external boundaries of the claim area on the earth's surface, allowing the claim area to be identified with reasonable certainty.

It follows that I am satisfied that the physical description of the external boundaries meets the requirements of s62(2)(a)(i) and that the map shows the boundaries of the claim area in compliance with the requirements of s62(2)(b).

Internal boundaries

The internal boundaries are described in schedule B of the application. These boundaries are described in part by a formula that excludes a variety of tenure classes from the claim area.

A list of tenures is provided – this list includes each of the interests or tenures set out in s23B of the Act (this is the section of the Act that defines Previous Exclusive Possession Acts and certain exceptions thereto). The tenures listed in the application are not restricted to those that meet the criteria of s 23B (2) (a) and (b) – namely that the acts are valid and took place before 23 December 1996. However, this does not in my view mean that the tenures listed in schedule B of the application can not be identified or located on the earth’s surface, on the basis of the information in schedule B.

Additionally, dedicated roads, dedicated road reserves and creeks or rivers dedicated to the State of Queensland have also been excluded from the claim area.

I am satisfied that this information is sufficient for it to be said with reasonable certainty whether native title rights or interests are claimed in relation to particular areas of land or waters within the external boundaries of the claim area.

In this regard I have taken into account the judgement 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 judgement 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 considerable research of tenure and geographic/topographic information or data held by the State of Queensland, but nevertheless it is reasonable to expect that the task can be done on the basis of the information provided by the applicants.

It follows that I am also satisfied that the information in the application regarding the internal boundaries of the claim area meets the requirements of s62(2)(a)(ii).

The requirements of s62(2)(a), s62(2)(b) and s190B2 are met.

Result: Requirements met

s.190B(3)

Identification of the native title claim group:

The Registrar must be satisfied that:

- (a) the persons in the native title claim group are named in the application; or*
- (b) the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group.*

Reasons for the Decision

Section 190B(3)(a) does not apply as all the persons in the group are not named in the application.

It is necessary therefore for the application to meet the requirements of s190B(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 descendants.

I am satisfied that the descendants of the named persons (having regard to the ancestors named in schedule A) 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, 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 s190B(3)(b) is met.

Result: Requirements met

s.190B(4)

Identification of claimed native title:

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

Under this limb, I must be satisfied that the description of the native title rights and interests (found at Schedule E of the application) is sufficient to allow the claimed rights and interests to be readily identified.

At Schedule E of the application the applicants claim that they are entitled to “*use, enjoyment and occupation of their lands and waters, in the case of some of the parcels in this application, their rights co-exist with the holders of other rights and interests in the land.*”

Listed at Schedule E are five categories of rights and interests (or specific activities in exercise of the core right to use, enjoyment and occupation of the land and waters) claimed relating to:

1. The discharge of cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities in relation to the native title land;
2. The establishment of residences on the native title land;
3. Carrying out economic life on the claim area;
4. The determination of use rights in relation to activities which may be carried out by others on the native title lands; including carrying out economic life on the native title lands;
5. Access to and use of the natural resources on the native title lands, including management and conservation of the natural resources.

I am satisfied that all of the rights and interests listed can be readily identified from the description provided at schedule E of the application. Refer also to my reasons for decision in respect of s.190B6 (below).

I note the following qualifications to the claimed rights and interests:

1. Schedule E commences with the statement that the *“native title rights and interests claimed are subject to the valid laws of the state and commonwealth generally and to any other valid acts of adverse dominion.”*
2. The applicants do not specifically state that the application does not include a claim for exclusive possession over previous non-exclusive possession act areas as defined in s.23F of the Act. However, paragraph 2 of Schedule E of the application states that:

“in the case of some of the parcels in this application, their (ie. The Bar-Barrum people’s) rights co-exist with the holders of other rights and interests in the land”.

I have read this paragraph in conjunction with the draft order sought by the applicants at Schedule J of the application in order to clarify its meaning. Paragraph 1 of Schedule J states that:

“The Bar-Barrum People have the right to occupy, enjoy and use the determination areas in accordance with and subject to their traditional laws and customs, and subject to the co-existing rights and interests of the statutory title holders.”

Accordingly, I am satisfied that the applicants’ intention was to qualify the exclusivity of the rights and interests. I have read this exclusion to mean that the rights and interests claimed do not extend to excluding others in respect of any area where a previous non-exclusive possession act was done or a valid non-exclusive tenure exists which, at law affects permanently the rights or interests of native title holders.

3. At Schedule Q of the application the rights and interests claimed are further qualified as follows: “*The native title claim group do not claim any minerals, petroleum or gas wholly owned by the Crown.*”

As stated above, the applicants particularise the rights and interests claimed into a list of five specific rights and interests and subdivide two of these into further individual rights and interests. All these rights and interests are comprehensible, as are the qualifications referred to above. I therefore consider the rights and interests identified by the applicants to be clearly defined and readily identifiable.

Result: Requirements met

s.190B(5)

Sufficient factual basis:

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

I must be satisfied pursuant to s190B5 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 to support the assertions that:

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

is sufficient to support those assertions: see *Martin v Native Title Registrar* [2001] FCA 16.

A general description of the factual basis is provided in Schedule F of the application which in turn refers to the affidavits of ‘**name deleted**’, ‘**name deleted**’ (applicant) and ‘**name deleted**’ at Attachment F.

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

The factual basis provided in the affidavits 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. See:

- *'name deleted'* (27/04/01) paras.3-8, 12-13, 15, 19;
- *'name deleted'* (26/04/01) paras. 2-5, 7, 9, 13, 14-16;
- *'name deleted'* (26/04/01) paras. 2-6, 9, 11, 14.

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

This subsection requires me to be satisfied that the factual basis provided supports 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.

On the basis of the information set out in the affidavits in Attachment F, I am satisfied that the factual basis provided supports this assertion. This information supports an assertion that the native title claim group continue to observe a system of traditional laws and customs that gives rise to the claimed native title rights and interests in the claim area. See the material outlined under s190B5(a) of this decision and see also:

- *'name deleted'* (27/04/01) paras. 9-11, 14, 16-18;
- *'name deleted'* (26/04/01) paras. 7-8, 10-12, 17-19;
- *'name deleted'* (26/04/01) paras. 7-8, 10, 12-14.

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

Under this criterion, I must be satisfied that the factual basis provided is sufficient to support an assertion that the native title claim group continues to hold native title in accordance with their traditional laws and customs. For the reasons set out in 190B(5)(b) and having regard to the same material I am satisfied that the factual basis provided is sufficient to support the assertion that the claim group continue to hold native title in accordance with those traditional laws and customs.

Consequently, and taking the above matters into consideration, I am satisfied that the factual basis provided sufficiently supports the assertions outlined in s190B5.

Result: Requirements met

s.190B(6)

Prima facie case:

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

Reasons for the Decision

Under s190B(6) I must consider that, prima facie, at least some of the native title rights and interests claimed can be established.

‘Native title rights and interests’ are defined at s223 of the *Native Title Act*. This definition specifically attaches native title rights and interests to and water, and in summary requires;

- A. the rights and interests to be linked to traditional laws and customs;
- B. those claiming the rights and interests to have a connection with the relevant land and waters; and
- C. those rights and interests to be recognized under the common law of Australia.

The definition is closely aligned with all the issues I have already considered under s.190B5. I will draw on the conclusions I made under that section in my consideration of s.190B6.

Under s.190B(6) I must consider that, prima facie, at least some of the rights and interests claimed can be established. The term “prima facie” was considered in *North Ganalanja Aboriginal Corporation v Qld* 185 CLR 595 by their Honours Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who 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 (2nd ed) 1989].”

I have adopted the ordinary meaning referred to by their Honours when considering this application and rely on the information contained in Schedule G of the application and the affidavits referred to in my reasons under s.190B5.

Schedule E describes the native title rights and interests claimed by the applicants. It is stated that the claim group is entitled to ‘*use, enjoyment and occupation of their land and waters*’. Schedule E then lists five specific categories of rights and interests that are claimed. Under two of the five categories is a list of some further rights that come within the category.

In considering this condition I have had regard to information in Schedule G and in Attachments F and R of the application. I have also had regard to the decision of the Full Court of the Federal Court in *The State of Western Australia –v- Ward* [2000] 170 ALR 159 (‘Ward’).

1. *Discharge cultural, spiritual, traditional and customary rights, duties, obligations and responsibilities on, in relation to, and concerning the native title land including to:*
 - (i) *Preserve sites of significance to the native title holders and other Aboriginal people on the native title land:*

Established.

'name deleted' affidavit, para. 16-18;

'name deleted' affidavit, para 18-19;

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

- (ii) *Determine, give effect to, pass on, and expand the knowledge and appreciation of their culture and tradition;*

Not Established.

The majority in Ward's case held that the common law does not provide for the protection or enforcement of purely religious or spiritual affiliation with land, divorced from actual physical use of the land. I am of the view that these two rights offend the principles in *Ward* and can not be prima facie established for registration pursuant to s190A.

- (iii) *Regard the native title land as part of the inalienable attachment of the native title holders to the native title land and ensure that the use of the native title land is consistent with that attachment;*

Established

I consider this right and interest to rely upon or be parasitic to the native title rights and interests that relate to actual physical use of the land established by the native title claim group for the purposes of registration. I am of the view that the way that this right is framed makes it clear that it is grounded in physical presence and activities on the native title land. I therefore consider it to be established on a prima facie basis.

- (iv) *Maintain the cosmological relationship, beliefs, practices and institutions through ceremony and proper and 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.

'name deleted' affidavit, paras. 10-11, 15-18, 19;

'name deleted' affidavit, paras. 7-8, 15-19;

'name deleted' affidavit, paras. 7-8, 13-14;

Schedule G information relating to the Bar-Barrum People maintaining their spiritual connection with Bar-Barrum country.

- (v) *Inherit, dispose of or confer native title rights and interests in relation to the native title land on others in accordance with custom and tradition;*

Established.

The affidavits provide 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. It is my view that this is not a right that could be said to be divorced from actual physical use of the land, given the information that has been provided in support of the right. See:

'name deleted' affidavit, para 8-9, 10-11, 14, 16-18;

'name deleted' affidavit, paras. 10, 15-17, 19;

'name deleted' affidavit, paras. 8-10, 13-14

- (vi) *determine who are the native title holders;*

Established.

The affidavits at attachment R 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 titleholders within their group in accordance with traditional law and custom. The material in the authorisation and attachment F affidavits prima facie supports that this right is established.

- (vi) *resolve disputes in relation to the native title land;*

Established.

The affidavits at attachment R on the authorisation process prima facie support the establishment of this right. The affidavits outline how the Bar-Barrum People make decisions in relation to Bar-Barrum land business, in accordance with their custom and tradition. The process involves discussions amongst elders and talks with other members of the Bar-Barrum community. This process results in a consensus being reached amongst the Elders and senior Bar-Barrum community members that binds all members of the Bar-Barrum people. In my view this decision making process has a sufficient nexus with the use of the land to support the establishment of this right on a prima facie basis.

2. *Establish residences on the native title land;*

Established.

It is stated in Schedule G of the application that the Bar-Barrum People live on and visit Bar-Barrum country and are in continuous use and occupation of that country. ‘Name deleted’ (27/4/01) tells of camping on and occupying country under claim. I note also the statements in schedule L of the application that the Bar-Barrum people occupied and continued to occupy the USL land claimed in the application and the Aboriginal reserves located in the claim area at Mt Garnett.

3. *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

The evidence of ‘name deleted’ (27/4/01) is that he has been involved in cultural heritage work in the claim area and in environmental and cultural management of country. Schedule L indicates that the applicants claim the benefit of s47A and s47B. The claimed native title rights and interests do not extend to a claim to exclusivity, in the event of other rights and interests having extinguished such a claim to exclusivity (see reasons under s190B4). I am therefore satisfied that such a right is restricted to one that is non-exclusive, except where s47A or s47B can be made out.

4. *Exercise and carry out economic life (including by way of barter) on the native title lands including to hunt, fish and carry out activities on the native title land, including the creation, growing production or harvesting of natural resources;*

Established.

I am satisfied that the terminology ‘carry out economic life . . . on [emphasis added] the native title land’ makes it clear that the right at 3 i) 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 being exercised or carried out on country and for traditional purposes. Note that it is to be carried out “on the claim area”. The use of the phraseology “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). I therefore find that this is a right capable of registration pursuant to s190A as, prima facie, it takes place on country and relates to trade in traditional resources.

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 affidavits of ‘name deleted’, ‘name deleted’ & ‘name deleted’ state that they and their families hunted, fished and foraged for foods and firewood, and conducted mining activities on the land.

‘name deleted’ affidavit, para. 8-9, 12-14, 19

‘name deleted’ affidavit, paras. 9-11, 13-14, 19;

‘name deleted’ affidavit, paras. 9-12.

5. *Have access to and use the natural resources of the native title land including the right to:*

- (i) *maintain and use the native title land;*

Established.

This right is established prima facie for the reasons detailed under 4 above.

- (ii) *conserve the natural resources of the native title land;*

- (iii) *safeguard the natural resources of the native title land for the benefit of native title holders;*

- (iv) *manage the native title land for the benefit of the native title holders;*

All Established.

These rights are established prima facie by the information in para.16 of the Congoo affidavit and the information at Schedule G of the application.

- (v) *use the natural resources of the native title land for social, cultural, economic, religious, spiritual, customary and traditional purposes.*

Established.

I have formed the view that the wording of this right makes it clear that this right, insofar as it relates to trade at all, relates to the trade in traditional resources on the claim area and therefore should not fall foul of *Ward’s case*. In this regard, para. 4(v) talks of the right “*to have access to and use of the natural resources of the native title land*” for “*social, cultural, economic, religious, spiritual, customary and traditional purposes*”. I find that this means use of natural resources whilst on the

claim area. The listed purposes are inclusive in the sense that the right of usage must meet all of the purposes (this is because of the use of the inclusive 'and'). Therefore, the economic purpose (which would arguably include trade) must also be for a traditional purpose and would not, on the face of it, extend beyond trade in traditional resources. 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 evidence produced in support of this right and interest does not extend this right beyond trade in traditional resources whilst on country – see:

'name deleted' affidavit, para. 8-9, 12-14, 19

'name deleted' affidavit, paras. 9-11, 13-14, 19;

'name deleted' affidavit, paras. 9-12.

Conclusion

As I have found that all but 1 of the claimed rights and interests are prima facie established, it follows that the general right from which these rights flow (ie. the entitlement to "use, enjoyment and occupation") is also established prima facie, within the limits of that recognised by the common law. The stated qualifications to this claim (see Schedules E, J and Q) satisfy me that rights are not claimed where these are not recognised at law. I need only be satisfied that 'some' of the claimed rights and interests are established – as all but one of the claimed rights have been prima facie established, the requirements of s190B6 are met.

Result: Requirements met

s.190B(7)

Traditional physical connection:

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

- (a) *currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or*
- (b) *previously had and would reasonably 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 behalf of such a holder of a lease.*

Reasons for the Decision

Under s190B(7) I am 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. Consequently I will make reference in my conclusion to one member of the native title claim group.

I refer to the affidavit of '**name deleted**' (26/4/01) at attachment F of the application. I have had regard to his sworn testimony providing information:

- that he is a Bar-Barrum person,
- that he is a descendant of a named Bar-Barrum ancestor,
- about growing up in Mt Garnett (I see from the information in schedule B that this is within the claim area),
- how he hunts and fishes for bush tucker,
- about being taught about traditional stories by his elders, and being shown his country when being taken out to fish,
- about being taught by his mother about traditional medicines,
- how he collects firewood and timber to make tools and artefacts,
- about being taught by his elders about Bar-Barrum customs and special places on country.

I am satisfied that the deponent is a member of the native title claim group. The deponent 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.

Result: Requirements met

s.190B(8)

No failure to comply with s.61A:

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

Reasons for the Decision

For the reasons that follow I have concluded that there has been compliance with s61A.

S61A(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.

S61A(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 s23B of the Native Title Act, is excluded from the claim area. Although the description of tenures excluded from the claim area in schedule B is not limited to those tenures that are valid and granted on or before 23/12/96, all of

the categories of previous exclusive possession acts defined in s23B are otherwise captured. I am therefore satisfied that the claim is not made over any such areas.

S61A(3) Previous Non-Exclusive Possession Acts

I am satisfied that the applicants are not seeking exclusive possession over areas the subject of previous non-exclusive possession acts – refer to my reasons under s190B4 for the full statements in Schedules E and J of the application. I am satisfied that these statements make it clear that exclusive possession is not claimed where the area is covered by a non-exclusive possession act defined in s23F.

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 s61A the application should not have been made.

Result: Requirements met

s.190B(9)(a)

Ownership of minerals, petroleum or gas wholly owned by the Crown:

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

At Schedule Q of the application it is stated that: *The native title claim group does not claim ownership of minerals, petroleum or gas wholly owned by the Crown”.*

This exclusion is consistent with the requirements of s190B(9)(a).

Result: Requirements met

s.190B(9)(b)

Exclusive possession of an offshore place:

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 interests in relation to the whole or part of the offshore place;*

Reasons for the Decision

No offshore places are claimed in this application – see map of the claim area which establishes that the claim area is located inland from the coast. See also the statement in schedule P that the section is ‘not applicable’.

Result: Requirements met

s.190B(9)(c)

Other extinguishment:

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

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