National Native Title Tribunal

REGISTRATION TEST

EDITED REASONS FOR DECISION

DELEGATE: Danielle Malek

Application Name:	Bar-Barrum People #3		
Names of Applicants:	Mr Brendan Roger Day, Ms Agnes Cecilia Day, Mr Darcy John Bradley Day, Mr Tom Congoo, Mr John Wason		
Region:	FNQ	NNTT No.:	QC01/18
Date Application Made:	27 April 2001	Federal Court No.:	Q6017/01

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

DECISION

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

Danielle Malek

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

26th November 2002
Date of Decision

Brief History of the Application

This 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 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 Robson of the Federal Court granted leave to the applicants to amend the application.

The amendment of the application in October 2001 has triggered the requirement to consider the amended application pursuant to the requirements of s.190A (cf s.64(4) and s.190A(1)).

Information considered when making the Decision

In the first registration test decision on this application made on 28 May 2001 the delegate has considered and reviewed the original 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 QC01/18.
- 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.

I have now considered and reviewed all relevant material including:

- 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: QC01/17, QC01/32, QC01/33, QC01/34, QC01/35.
- Letter from applicant's legal representative dated 12 March 2002.
- E-mail from **[NNTT Officer 1 – name deleted]** to **[NNTT Officer 2 – name deleted]** dated 16 September 2002 in relation to registration matters in the Thanakwithi application (QC00/15).
- Letter from applicant's legal representative dated 31 October 2002.
- Preliminary Anthropological Assessment of the Bar-Barrum Native Title Claim by **[Anthropologist 1 – name deleted]** and **[Anthropologist 2 – name deleted]**, October 1997.
- The determination of native title made in relation to the Bar-Barrum People's application QC96/105 on 28 June 2001.
- The Register of Native Title Claims and Schedule of Native Title Applications.
- The National Native Title Register.

Copies of material provided directly to the Registrar by the applicants in relation to my consideration of the amended application were provided to the State on 15th November 2002**.** This was in compliance with the decision in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591- 1594*. 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 applicants), I have not considered any information and materials 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* unless otherwise specified. All references to 'the application' refer to the amended application filed in the Federal Court on 1 October 2001 unless otherwise specified.

Reasons for decision

1. On 28 May 2001 the delegate of the Registrar accepted native title application determination application QC01/18 (Bar Barrum People #3) for registration under s.190A of the *Native Title Act 1993.*

2. On 1 October 2001 the applicants filed an amended application in the Federal Court. On 11 October 2001 the Federal Court granted the applicants leave to amend their application in the form filed on 1 October 2001, and, pursuant to s.190A(1), this amended application must now be considered for registration.

3. The amended application contains the following differences to the original application filed on 27 April 2001:
   - The name of the apical ancestor **[Person 4 – name deleted]** is changed to **[Person 4]** in Schedule A.
   - Three new applicants are added and one of the original applicants has been removed.

4. In considering the amended application under s.190A I have has particular regard to the provisions of s. 61(1), s.62(1)(a), s.62(2)(a), s.62(b), s.190C(3), s.190C(4), s.190B(2), s. 190B(3), s.190B(4), s.190B(5), s.190B(6), s.190B(8) and s.190B(9).

5. I have had particular regard to the majority judgement in *Western Australia v Ward (2002)* 191 ALR 1 dated 8 August 2002 in considering the provisions of s.190B(2), s.190B(4), S.190B(5), S.190B(6) and s.190B(9).

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 note that the name of the apical ancestor **[Person 1 – name deleted]** in the original application has been changed to **[Applicant 1 – name deleted]** in the amended application. In a letter dated 12 March 2002 in relation to the Bar-Barrum #4 application, the applicants' legal representative states that **[Applicant 1]** was the only child of **[Person 2 – name deleted]** and **[Person 1]** and a well known Bar-Barrum person; he was substituted as an apical ancestor in order to make the list clearer to applicants. The listing of **[Applicant 1]** as an apical ancestor does not exclude any persons from the native title claim group who were not included in the previous application.

I do not have any other information which 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 applicants' names are stated at Part A of the application. The address for service is provided at Part B 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

s.61(5)(a)
The application is in the form prescribed by Regulation 5(1)(a) of *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).

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 s.62 (1)(b) and s.62(2) below.

s.61(5)(d)
The application is accompanied by an affidavit by each of the applicants in relation to the matters in s62(1)(a)(i) to (v).

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 applicants. **[Person 3 – name deleted]** was included as an applicant in the original application but has been removed by the current amendment; three new applicants have been added in the amended application:**[Applicant 2 – name deleted]** , **[Applicant 3 – name deleted]** and**[Applicant 4 – name deleted]**. In an affidavit attached to the amended application for QC01/17 **[Person 3]** deposes that he is an applicant for Bar-Barrum applications Q6015/01 and Q6017/01 (QC01/17 and QC01/18). He deposes that for personal and family reasons he cannot continue to act as an applicant and has explained to the Bar-Barrum people that he wishes to withdraw as an applicant.

Each applicant has sworn an affidavit that addresses the matters required by s.62(1)(a)(i) to (iv); these are included with the amended application. Affidavits addressing the basis for authorisation required by s.62(1)(a)(v) are provided at Attachment R of the amended application for each of the three new applicants. Affidavits addressing the basis of authorisation required by s.62(1)(a)(v) are provided at Attachment R of the original application for the applicants **[Applicant 5 – name deleted]** and**[Applicant 6 – name deleted]**. *Drury v WA* [2000] 97 FCR 169 is authority for the proposition that fresh s62(1)(a) affidavits are not necessarily required each time an application is amended. I am therefore satisfied that the affidavits of **[Applicant 5]** and **[Applicant 6]** accompany the current application as required by s.61(5).

The affidavits are all dated, signed by the deponent and competently witnessed. I am satisfied that the affidavits sufficiently address the matters required by s.62(1)(a)(i)-(v).

Result: Requirements met

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

Comment on details provided

At Schedule M of the application the applicants refer to the affidavits of **[Applicant 3]**, **[Applicant 5]** and **[Applicant 2]** at Attachment F (provided with the original application). These provide details of traditional physical connection.

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 s.190B(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 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

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 s.190B(2) have been met, I am satisfied that the map 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, the applicants state that no searches have been conducted by the applicants in relation to this land.

Result: Requirements met

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

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 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 decision in *Queensland v Hutchison* [2001] FCA 416 at [25] is authority for the proposition that only material that is part of the application can be relied on in support of this requirement. A general description of the factual basis on which it is asserted that the native title claim group has, and their predecessors had, an association with the area is provided at Attachment F of the application. Attachment F of the application consists of affidavits by three of the applicants: **[Applicant 3], [Applicant 7 – name deleted],** and **[Applicant 2]**. 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)

The affidavits of **[Applicant 5]**, **[Applicant 2]** and **[Applicant 3]** attest to the association of the native title claim group and their predecessors with the claim area. In their affidavits they refer to a range of activities they carry out in the claim area together with members of their families (including their parents, cousins, grandparents, children, and grandchildren), and other Bar-Barrum families.

- Affidavit of **[Applicant 5]** paras 6-9, 11-14
- Affidavit of **[Applicant 2]** paras 6-9, 13-17
- Affidavit of **[Applicant 3]** paras 5-8, 12, 13, 15-19

The affidavits also refer to mining activities carried out by the Bar-Barrum in the claim area and to certain traditional Bar-Barrum camping areas, travelling stops on hunting trips, and men's meeting places.

- Affidavit of **[Applicant 5]** paras 11, 14
- Affidavit of **[Applicant 2]** paras 13, 16, 17
- Affidavit of **[Applicant 3]** paras 12, 15

At Schedule G of the application the applicants describe a number of activities carried out by the Bar-Barrum and state that the Bar-Barrum people live on country, work on country and are in continuous occupation of Bar-Barrum country.

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

The affidavits of **[Applicant 5]**, **[Applicant 2]** and **[Applicant 3]** attest to the existence of traditional laws and customs that give rise to the claimed native title. In their affidavits they refer 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. They also refer to teaching traditional Bar-Barrum customs to Bar-Barrum children.

- Affidavit of **[Applicant 5]** paras 7-14
- Affidavit of **[Applicant 2]** paras 7-19
- Affidavit of **[Applicant 3]** paras 8-19

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 affidavits of **[Applicant 5]**, **[Applicant 2]** and **[Applicant 3]** support 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, **[Applicant 3]** 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). In their affidavits, **[Applicant 5]** and **[Applicant 2]** depose that they continue to collect firewood and timber to make tools and artefacts in country (para 12, para 14). **[Applicant 2]** also deposes that when he goes fishing in Rudd Creek, he always leaves fish behind for the water spirits to enable him to catch more fish when he returns (para 19).

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**

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

It is stated in Schedule G that the native title claim group live on, visit, gather food from, work on, and carry out cultural and heritage protection on country. The Bar-Barrum people also assert, among other things, continuous use and occupation of the 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 to the application is marked "not applicable". The analysis completed by the Tribunal's Geospatial Unit (dated 20 September 2002) concluded that no claimant or non-claimant applications fall within the external boundary of the application. This result was confirmed by a further overlap analysis completed on 5 November 2002.

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

The applicants state at Schedule I that 'Kagara Zinc has issued a notice' but no further details of the notice are provided. The applicants' legal representative subsequently provided a copy of a notice in relation to low impact EPM 13272, issued by Kagara Zinc Pty Ltd, directly to the Registrar. This document is a notice of intention to make an application for a low impact exploration permit pursuant to s.486 of the Queensland *Mineral Resources Act* 1989.

An analysis completed by the Tribunal's Geospatial Unit on 20 September 2002 states that three s.29 notices fall within the external boundary of the application: two notices in relation to EPM 9892 (low impact), and one notice in relation to EPM 13406 (high impact).

Section 62(2)(h) requires that the application contain details of any notices issued under s.29 of the *Native Title Act 1993* (Cth) or under a corresponding provision of a law of a State or territory [emphasis added]. It is my view in relation to this condition that reference in s.62(2)(h) to 'corresponding' legislation refers to something that is 'analogous' or 'equivalent' to notices 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 s.26A of the Act.

I am therefore of the opinion that, as the Kagara notice is not one which is covered by the provisions of s62(2)(h), it is not necessary for the applicants to provide details of the notice in the application.

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 and 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 are no overlapping applications that cover the area of this application which were on the Register of Native Title Claims, when this application was made. This was confirmed in the assessment prepared by the Tribunal's Geospatial Unit dated 20 September 2002 and the overlap analysis conducted on 5 November 2002.

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 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 2]** 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 applicants are members of the Bar-Barrum native title claim group.

The applicants are 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. Schedule R in turn refers to the affidavits of the applicants at Attachment R.

Each of the applicants has sworn an affidavit addressing the matters required by s.62. The two original applicants – **[Applicant 5]** and **[Applicant 6]** - have sworn fresh s.62 affidavits (dated 24 September 2001 and 18 September 2001 respectively). The 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. They state that the basis for this authorisation is further set out in their affidavits in Attachment R.

Affidavits addressing the basis for authorisation sworn by the three new applicants are provided at Attachment R of the amended application. Affidavits sworn by the two original applicants are included at Attachment R of the original application. Each of the applicants' affidavits 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 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 5]** and **[Applicant 6]** 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 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 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.

In relation to authorisation of the amended application the affidavits of**[Applicant 2]**, **[Applicant 3]** and **[Applicant 4]** 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 2]** 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. At Schedule A2 of the application, the applicants 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.

The s.62 affidavits of the original applicants, **[Applicant 6]** and**[Applicant 5]**, 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 2]**, 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 ILUAs entered into in the course of the determination and the new native title applications. The meeting was advertised in relation to the ILUAs 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 3 – name deleted]** family asserts a closer relationship to the Mt Garnett area (Bar-Barrum applications #2 and #3); while **[Person 3]** and her family 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-Baruum country is consistent with Bar-Barrum traditional laws and customs.

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 application is properly authorised pursuant to s190C(4)(b) of the Act.

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. Schedule B of the current amended application refers me to Attachment B. The amended application contains no Attachment B; rather, the written description of the subject area is contained in Schedule B of the original application.

S190B(2) requires that the Registrar (or his delegate) must be satisfied that the information and map *contained in the application* [my emphasis] describes the claim area with reasonable certainty. The definition of a claimant application in s253 of the Act includes information filed with the original and amended application. Furthermore, the Brisbane Registry of the Federal Court has confirmed in relation to another matter that the Court takes the view that information filed with the original application need not be re-filed at the time of amendment if the information is unchanged (refer e-mail to **[NNTT Officer 2]**, dated 16/9/02). It is my view, then, that the written description contained in Schedule B of the original amendment is to be taken to be 'in the application' for the purposes of the registration test for the current application. That said, this written description is supplemented by a map in the amended application showing the external boundary of the claim area (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 s.63 entitled "Bar-Barrum #3").

The written description in Attachment B defines the claim area as being comprised of 26 parcels, each described by a lot on plan number, and one part land parcel, further described by reference to a series of approximated longitude and latitude coordinates. The geographic coordinates are referenced to Australian Geodetic Datum 1984 (AGD84) in decimal degrees.

The map, prepared by the Tribunal's Geospatial Unit and dated 17 April 2001, is A3 in size, and contains a scale, north point and geographic coordinates. The external boundaries of each of the claimed parcels, including the partly claimed parcel, are outlined in black. The map identifies the location of the 27 parcels by lot/plan number. The lot/plan references would appear to follow the State of Queensland's land tenure identification system being a further means of locating and identifying the parcels on the earth's surface. The assessment prepared by the Tribunal's Geospatial Unit (dated 20 September 2002) confirms that the description and map are consistent and identify the area with reasonable certainty.

As a result, 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.

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 s.23B of the Act (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. I concur with the view of the delegate in the previous registration test decision in this regard, that this does not mean that the tenures listed in Schedule B of the application cannot 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 note that an amended map was prepared by the Tribunal's Geospatial Unit (dated 28 May 2002), and removed a number of land parcels identified by the Queensland State Government as Grazing Homestead Perpetual Leases (GHPL). However neither the map nor the written description for this application has been amended in the Federal Court.

The issue was raised with the applicants' legal representative. In response to that letter (letter dated 30 October 2002), the applicants' legal representative stated that the claimants rely upon the exclusions in Schedule B as regards the apparent GHPL lots, and do not intend to amend the application at this time. Grazing Homestead Perpetual Leases in Queensland are Scheduled Interests under the *Native Title Act*, and are therefore previous exclusive possession acts (or PEPAs) pursuant to s23B(2)(c)(i). The exclusions in Schedule B of the application include an exclusion of Scheduled Interests. I note that at the time the amended application was filed, the applicants were not in possession of tenure information from the State which would indicate that the identified lots were GHPLs. *Daniels and Ors, et al v The State of Western Australia* [1999] FCA 686 is authority for the proposition that whether class or formula exclusions are acceptable depends on the state of knowledge of the claimants of the tenure in the area at the date when the application was made or amendment sought.

> "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." at [32].

As the applicants were not in possession of this information when the amendment was made, and as the intention of the exclusion clause appears to be to exclude areas over which PEPAs have taken place, I am satisfied that the exclusion clause effectively excludes from claim those lots subsequently identified as GHPLs. Refer also to my reasons under s.190B8 and 190B9(c) below.

In my view the information provided enables the internal boundaries of the claim area to be identified with reasonable certainty. This may require research of tenure 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.

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

S190B(3) requires the Registrar, or his delegate, to be satisfied that all the persons who hold common or group rights under traditional law and custom are named in the application; and that these persons are named sufficiently clearly so that it can be ascertained whether any particular person is in that group. As Attachment A does not purport to provide an exhaustive list of those individuals who are members of the native title claim group, it is necessary to consider whether the requirements of s. 190B(3)(b) have been met.

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 named Bar-Barrum apical ancestors. As noted in my reasons under s.61(1) above, the name of the apical ancestor **[Person 1]** in the original application has been changed to **[Applicant 1]** in the amended 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. 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 s.190B(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 the readily identified.

Reasons for the Decision

Native title rights and interests claimed by the applicants

At Schedule E of the application the applicants claim that they are entitled to "use, enjoyment and occupation of their lands and waters, [and that] 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." The applicants do not claim these rights 'to the exclusion of all others' or 'against the whole world'; in addition, the applicants explicitly acknowledge that their native title rights and interests 'co-exist' with those rights and interests held by others in some area (the applicants do not claim the benefit of ss47, 47A or 47B in relation to any land or waters in the claim area: see Schedule L). For these reasons, the claim appears to be a non-exclusive in nature.

In addition to this general statement, the applicants claim particular rights which appear to derive from the core right to use, enjoyment and occupation of the land and waters. These rights are listed in Schedule E as follows:

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;
   (ii) determine, give effect to, pass on, and expand the knowledge and appreciation of their culture and tradition in relation to the land in this application;
   (iii) regard the native title land as part of the inalienable attachment of the native title holders to he native title land and ensure that the use of the native title land is consistent with that attachment;
   (iv) maintain the cosmological relationship, beliefs, practice and institutions through ceremony and proper and appropriate custodianship of the native title land in this application and special and sacred sites, to ensure the continued vitality of culture and the well-being of the native title holders;
   (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;
   (vi) determine who are the native title holders;
   (vii) resolve disputes in relation to the native title land

2. Establish residences on the native title land;

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;

   (i) 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;

4. Have access to and use of the natural resources of the native title land, including the rights to:
   (i) maintain and use the native title land;
   (ii) conserve the natural resources of the native title land;

(iii) safeguard the natural resources of the native title land for the benefit of the native title holders;
(iv) manage the native title land for the benefit of the native title holders;
(v) use the natural resources of the native title land for social, cultural, economic, religious , spiritual, customary and traditional purposes.

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

1. Schedule E commences with the statement: "it is duly noted 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." This statement is repeated in Schedule B.

2. Schedule Q states that: "The native title claim group do not claim any minerals, petroleum or gas wholly owned by the Crown."

3. There is no claim to exclusive possession over any offshore place in Schedule P.

The requirements of the Act

S.190B(4) requires the Registrar or his delegate to 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. The phrases 'native title' and 'native title rights and interests' are defined in s.223 of the *Native Title Act* 1993 (Cwth).

s.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
> (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'.

Rights which are not readily identifiable include the rights to control the use of cultural knowledge that go beyond the right to control access to lands and waters,[1] rights to minerals and petroleum under relevant Queensland legislation,[2] exclusive rights to fish offshore or in tidal waters and any native title right to exclusive possession offshore or in tidal waters.[3] To meet the requirements of s.190B(4), I need only be satisfied that at least one of the rights and interests claimed is sufficiently described for it to be readily identified.

[1] *Western Australia v Ward* (2002) 191 ALR 1, para [59]
[2] *Western Australia v Ward*, paras [383] and [384]; *Wik v Queensland* (1996) 63 FCR 450 at 501-504; 134 ALR 637 at 686-688.
[3] *Commonwealth v Yarmirr* (2001) 184 ALR 113 at 144-145.

In *Western Australia v Ward (2002) 191 ALR1* (2002) the majority of the High Court found that a right to possess, occupy, use and enjoy as against the whole world is a readily identifiable native title right and interest: at [51]. On the other hand the Court indicated that a claim to non-exclusive 'possession, occupation, use and enjoyment' where this amounts to a *composite* right may not be readily identifiable. 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]. However, a claim to separate and non exclusive rights to use, occupy and enjoy areas may be readily identifiable in the sense required by s.190B(4), particularly where the right is claimed for the purpose of carrying out activities that are expressions of native title rights and interests held under traditional law and custom.

In the current application the applicants do not claim possession, occupation, use and enjoyment of the claim area as against the whole world; they claim separate non-exclusive rights to use, enjoyment and occupation of their lands and waters. I am satisfied therefore that these rights are readily identifiable in the sense required by s.190B(4).

Furthermore, I note that in *Ward*, the High Court confirmed that a right to protect and prevent the misuse of cultural knowledge does not amount to a right in the lands or waters and is therefore not a right which is readily identifiable: [64]. Their Honours considered that 'recognition' of such a right went beyond denial or control of access to land and would involve, for instance, the restraint of visual or auditory reproductions of what was to be found, or what was to take place there. They stated:

> 'However, it is apparent that what is asserted goes beyond [a right to control access] to something approaching an incorporeal right akin to a new species of intellectual property… the recognition of this right would extent beyond denial of right of access to land held under native title… it is here that the second and fatal difficulty appears….' at [59].

In the current application the applicants claim the right to "maintain the cosmological relationship, beliefs, practice 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" (right 1(iv)). It is my view that the native title right and interest claimed by the Bar-Barrum people can be distinguished from the right sought to be recognised by the native title group in *Ward*. Firstly, the right claimed does not seek to restrain or control the dispersion of cultural knowledge; it does not embody the concepts of protection or prevention of the misuse of cultural knowledge disallowed in *Ward*. In addition, the right refers specifically to practices on land in relation to special and sacred sites; these activities clearly connect the Bar-Barrum people to their land and waters as required by s.223, and are linked to traditional laws and customs by use of the word 'through' in the phrase, 'Maintain… beliefs, practice and institutions through ceremony and proper and appropriate custodianship'. As a consequence I am satisfied that the right at paragraph 1(iv) is readily identifiable for the purposes of s.190B(4).

The applicants also claim the right to 'determine, give effect to and expand the knowledge and appreciation of their culture and tradition in relation to the land in this

application' (right 1(ii)). Once again, I am of the view that this is not a right "approaching an incorporeal right akin to a new species of intellectual property" as per *Ward* and can be distinguished from the right to cultural knowledge disallowed there.

As a result, I am satisfied that 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.190B(6).

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

For satisfaction of s190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s62(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 will 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 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.[4]

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 to support the following assertions is sufficient to support those assertions: that the

[4] See *Ward* at [382].

native title claim group have, and their predecessors had, an association with the area claimed, that the traditional laws and customs, acknowledged and observed by the native title group exist, and that 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 affidavits of **[Applicant 3]**, **[Applicant 5]** and **[Applicant 2]** at Attachment F. These are included with the original application. Schedule G provides details of activities currently carried out within the claim area. Schedule M also refers to the affidavits of **[Applicant 3]**, **[Applicant 5]** and **[Applicant 2]** at Attachment F, in relation to the traditional physical connection of members of the claim group to the area claimed.

Pursuant to s190A(3) of the Act, regard is also to 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 (application QC96/105) by **[Anthropologist 1]** and **[Anthropologist 2]**, 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 legal representative in a letter dated 12 March 2000. In that letter, legal representative for the applicants also confirmed that consideration was to be had to the report in relation to the s190B(5) condition of the registration test:

> 'the Bar-Barrum applicants have instructed that the Registrar may make reference to the Connection report of Dr Sommers 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'.

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 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;

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. The deponents provide examples of their association and the association of their parents, grandparents, uncles and other relatives with the area claimed. See:

- Affidavit of **[Applicant 3]** (27 April 2001) paras 4-9, 11-13, 15-19;
- Affidavit of **[Applicant 2]** (26 April 2001) paras. 3- 9, 13-19;
- Affidavit of **[Applicant 5]** (25 April 2001) paras. 3,-9, 11-14.

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

The anthropological assessment prepared by **[Anthropologist 1]** and **[Anthropologist 2]** outlines the anthropological, archaeological, and linguistic evidence for the association of the Bar-Barrum people with the claim area (pp. 23-28). The report states that due to the isolated and rugged terrain inhabited by the Bar-Barrum, there is little reference to the Bar-Barrum in the 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 and about the Great Dividing Range west of Atherton. The report nonetheless indicates that the Bar-Barrum share a language and kinship system similar to other groups of 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 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 extensive 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) above, the affidavits of **[Applicant 5]**, **[Applicant2]** and **[Applicant 3]** at Attachment F refer 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. They also refer to teaching traditional Bar-Barrum customs to Bar-Barrum children.

- Affidavit of **[Applicant 3]** (27 April 2001) paras 7-19;
- Affidavit of **[Applicant 2]** (26 April 2001) paras 7-19;
- Affidavit of **[Applicant 5]** (26 April 2001) paras 7-14.

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;
- gathering food on country;
- carrying out cultural and heritage protection on country;
- teaching Bar-Barrum children about Bar-Barrum culture on country;
- collecting food resources and gathering their livelihood from natural resources on Bar-Barrum country;
- maintaining spiritual connection with Bar-Barrum country.

The anthropological assessment prepared by **[Anthropologist 1]** and **[Anthropologist 2]** 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 (rights 1(i), 1(iv), 1(v), 3, 5(i) - (v)).
- 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 (rights 1(i), 1(iv), 1(v), 3, 5(i) - (v)).
- 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 (rights 1(ii), 1(iv), 1(vii), 4, 5(i)-(v)). 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 (rights 1(ii), 1(iv), 4, 5(i)-(v)).

In my view the information outlined above provides a sufficient factual basis to support the 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 claimed 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 are provided as follows.

- The affidavit of **[Applicant 3]** 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.
- The affidavit of **[Applicant 5]** deposes that he continues to collect timber and firewood to make tools and artefacts in country.
- The affidavit of **[Applicant 2]** deposes that he continues to collect timber and firewood to make tools and artefacts in country, and that when he goes fishing he always leaves some fish behind to thank the spirits so that they will catch more fish when they return there.
- Assertions which set out activities conducted by the native title claim group on the lands and waters of the claim area pursuant to traditional laws and customs (Schedule G).
- In the report of **[Anthropologist 1]** and **[Anthropologist 2]** the authors outline the 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

As a result, I am satisfied that the factual basis provided sufficiently supports the assertions outlined in s.190B(5).

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 s.190B(6) I must consider that, prima facie, at least some of the native title rights and interests claimed 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* 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, the affidavits of the applicants and the anthropological report 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, 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'. Schedule E also lists particularised rights and interests derived from and exercisable by reason of the existence of the native title. These rights and interests are particularised in the manner contemplated in the *Ward* judgment - that is, the rights and interests are expressed by reference to activities that may be conducted in relation to lands and waters claimed, such as hunting, fishing or collecting bush foods (*Ward* at [29], [51], [52]).The rights and interests set out in Schedule E are qualified by statements in Attachment B, and Schedules J, P and Q.

As I have stated previously under my reasons for s190B(4), the applicants do not claim these rights 'to the exclusion of all others' or 'against the whole world' insofar as the rights and interests 'co-exist' with the rights and interests of other non-native title holders in the area. As the applicants do not claim the benefit of ss47, 47A or 47B in relation to any land or waters in the claim area at Schedule L, the claim appears to be non-exclusive in character.

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: "without a right of possession of that kind [i.e., an exclusive right], it may be greatly doubted that there is any right to control access to land or make binding decisions about the use to which it is put" - 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 made of the land, are not capable of registration where a claim to exclusive possession cannot be maintained.

In light of this, I will consider each of the rights and interests claimed in the application and whether these can be established *prima facie* as required by s.190B(6) of the Act. In doing so, I am mindful of the tenure issues outlined above.

Identifiable rights and interests

In considering this condition I have had regard to information in Schedule G and in Attachments F and R of the application, and in the anthropological assessment of the Bar Barrum people's application prepared by **[Anthropologist 1]** and **[Anthropologist 2]**. I have also had regard to the decisions of the Full Court of the Federal Court and the High Court of Australia in the *Ward* cases.

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.

Among other things, the applicants claim a right to 'preserve' sites of significance to the native title holders. To the extent that this right amounts to a right to control access to and use of the claim area would do so, such a right would not be *prima facie* capable of being established. Rights to control access to and use of land and waters are not capable of registration where a claim to exclusive possession cannot be maintained: *Ward* at [52].

In a letter dated 31 October 2002 the applicant's legal representative confirmed that the applicants do not intend to claim rights to regulate non-native title rights in the area. The representative states that 'the Bar-Barrum recognise the rights of co-existing tenure holders where appropriate and do not presume to control other interest holder's rights'. As a result, I am satisfied that the right is not one which purports to control the access to and use of land in the claim area.

In Schedule G the applicants provide information relating to the claimants carrying out cultural heritage protection work on country. Reference is made to protecting significant sites and carrying out cultural and environmental management in the affidavits at Attachment F. See:

- Affidavit of **[Applicant 3]**, para. 16-18;
- Affidavit of **[Applicant 2]**, para. 18-19.

In the anthropological assessment of the Bar Barrum people's application prepared by **[Anthropologist 1]** and **[Anthropologist 2]** the authors document the knowledge of significant sites in Bar-Barrum country that members of the native title claim group maintain and pass on to the younger generation, and their concern to protect these sites (pp. 24-25, 69-70**).** For example the Bar-Barrum observe prohibitions against entry to a rock shelter that only men of 'high degree' could enter, to another sacred cave site the location of which was not disclosed to the researchers, and to a burial site south of the Petford training camp. They also observe traditional rules about men and

women camping in different locations in the vicinity of another important site, Castle Rock.

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

Established.

I note my conclusion in my reasons for decision under s.190B(4) that the right claimed at 1(ii) is not a right 'approaching an incorporeal right akin to a new species of intellectual property' and can therefore be distinguished from the right to cultural knowledge disallowed in *Ward.*

There is prima facie evidence for this right in Schedule G. Reference is made to the transmission and expansion of cultural knowledge at Attachment F. See:

- Affidavit of **[Applicant 3]**, paras. 9-11, 14, 16-18;
- Affidavit of **[Applicant 2]**, paras. 7-8, 10-12, 15, 17-19.

In the anthropological assessment by **[Anthropologist 1]** and **[Anthropologist 2]**, the authors note how **[Applicant 3]** has taught the younger generation about the bush foods of his country, material uses of natural resources and about the traditional stories related to sites on country (see p. 67ff).

(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 flow from 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. Following the decision in *Ward* (2002), this right may be registrable so long as it does not purport to give rise to a power to regulate non-native title rights in respect of the area. This issue was raised with the applicants' legal representative.

In a letter dated 31 October 2002 the applicant's legal representative confirmed that this right refers to a right to ensure that the use of the land is in accordance with the traditional laws and customs of the native title holding group, and that they do not intend to claim a right to regulate non-native title rights in the area. The representative states that 'the Bar-Barrum recognise the rights of co-existing tenure holders where appropriate and do not presume to control other interest holder's rights'. I am of the view that the way that this right is framed makes it clear that the applicants do not seek to regulate non-native title holder interests in 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 an[d] 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 noted in my reasons for decision under s.190B(4) that the right claimed at 1(iv) is not a right 'approaching an incorporeal right akin to a new species of intellectual property' and can therefore be distinguished from the right to cultural knowledge disallowed in *Ward.* Rather, the right appears to relate to the conduct of ceremony on country and proper custodianship of the native title land, activities which clearly connect the Bar-Barrum people to their land and waters pursuant to s.223 of the Act.

In Schedule G the applicants provide information relating to the Bar-Barrum People carrying out cultural heritage protection on country and maintaining their spiritual connection with Bar-Barrum country. The affidavits at Attachment F refer to the knowledge of traditional dances, songs and ceremonies still held by the older generation, passing on knowledge of significant sites and the stories associated with them to the younger generation and carrying out environmental and heritage management on country. See:

- Affidavit of **[Applicant 3]**, paras. 10-11, 15-18, 19;
- Affidavit of **[Applicant 2]**, paras. 7-8, 15-19;
- Affidavit of **[Applicant 5]**, paras. 7-8, 13-14.

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).

(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 of 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 3]**, paras 8-9, 10-11, 14, 16-18;

- Affidavit of **[Applicant 2]**, paras 7,8 10, 12, 15-17, 19;
- Affidavit of **[Applicant 5]**, paras 7-10, 13-14.

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. (Refer also to my comments under 1(vi) below). The authors also 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 1 – name deleted]** family. They also describe how one of the applicants, **[Applicant 3]**, 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.

(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, only the native title claim group is able to determine who are native title holders within their group in accordance with traditional law and custom.

In the affidavits at Attachment F the deponents state how they derive their Bar-Barrum identity through their father (in the case of **[Applicant 3]**) and/or through their mother (in the case of **[Applicant 2]** and **[Applicant 5]**). 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. This is largely as 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 authorisation and Attachment F affidavits and in the anthropological report *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.

In the anthropological assessment of the Bar Barrum people's application the authors describe the development of traditional Bar Barrum systems of governance dominated by male elders to one where senior women may also play leadership roles. This model also serves in relation to governance issues relating to land.

2. *Establish residences on 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 is 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 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 co-existing tenure holders where appropriate and don't presume to control other interest holder's rights" (letter dated 31 October 2002).

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 and the affidavits, and the anthropological report to satisfy me that this right can be established *prima facie*.

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. **[Applicant 3]** (in his affidavit dated 27 April 2001) 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.

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 1]** and **[Family 2 – name deleted]** families.

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;*

(i) 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.

Not established.

The native title right at subparagraph 3(i) is expressed in such a way that it appears to flow from or be incident to the general right expressed in para. 3. Insofar as the applicants claim the right to grant, deny or impose conditions in relation to activities which may be carried out on the native title land, a question arises as to whether such a right amounts to a right to control access to and use of the claim area. The legal representative for the applicants has submitted that the native title rights and interests claimed do not amount to a right to control other interest holder's rights in areas where a claim to exclusive possession cannot be sustained (letter to Tribunal, dated 31 October 2002).

However, having regard to the phraseology of the right contained in para. 3 to "[d]etermine *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" [my emphasis], I am not satisfied that this right is one which can be read as providing for the co-existence of other interest holder's rights in areas where a claim to exclusive possession cannot be sustained. Rather, it appears to be a right which seeks to control the access to and use of the subject area for the activities listed in sub-paragraph 3(i), and is consequently not capable of being established *prima facie* in such areas.

4. 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;

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

Established.

The native title rights at subparagraphs 4(i)-(v) is expressed in such a way that they appear to flow from or be incident to the general right expressed in para. 4. 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. Again, I have had reference to a letter (dated 31 October 2002) from the applicant's legal representative in relation to the rights and interests claimed by the applicants. The representative states that the rights are "as between the Barr 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 4 only speaks in terms of having access to and use of the natural resources, and does not, unlike right 3, speak of granting, denying or imposing conditions upon the use of the land, words which inherently suggest control of land. For these reasons, I am satisfied that the rights expressed in 4 and 4(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 for these rights in para 16 of the affidavit of **[Applicant 3]**, at Schedule G of the application and in the anthropological assessment of the Bar Barrum people's application. Refer to my reasons for decision under 1(iv) above, and see further:

- Affidavit of **[Applicant 3]**, para. 8-9, 12-14, 19;
- Affidavit of **[Applicant 2]**, paras. 9-11, 13-14, 19;
- Affidavit of **[Applicant 5]**, paras. 9-12.

As I have found that these rights and interests are established *prima facie*, it follows that the general right from which these rights flow (i.e., the entitlement to "use, enjoyment and occupation" of the land) is also established *prima facie*.

Conclusion

The following native title rights and interests have been established *prima facie* pursuant to s.190B(6).

"The Bar-Barrum people are entitled to use, enjoyment and occupation of their lands and waters, [and] 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.

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;
   (iii) regard the native title land as part of the inalienable attachment of the native title holders to he native title land and ensure that the use of the native title land is consistent with that attachment;
   (iv) maintain the cosmological relationship, beliefs, practice and institutions through ceremony and proper and appropriate custodianship of the native title land in this application and special and sacred sites, to ensure the continued vitality of culture and the well-being of the native title holders;
   (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;
   (vi) determine who are the native title holders;
   (vii) resolve disputes in relation to the native title land

2. Establish residences on the native title land;

3. (Not established)

4. Have access to and use of the natural resources of the native title land, including the rights to:
   (i) maintain and use the native title land;
   (ii) conserve the natural resources of the native title land;
   (iii) safeguard the natural resources of the native title land for the benefit of the native title holders;
   (iv) manage the native title land for the benefit of the native title holders;
   (v) use the natural resources of the native title land for social, cultural, economic, religious, spiritual, customary and traditional purposes.

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 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.

'Traditional physical connection' is not defined in the Act. I am interpreting this phrase to mean that physical connection should be in accordance with the particular traditional laws and customs relevant to the claim group. The explanatory memorandum to the *Native Title Act* explains that this "connection must amount to more than a transitory access or intermittent non-native title access" (para 29.19 of the 1997 EM on page 304).

Schedule M refers to the affidavits of **[Applicant 3]**, **[Applicant 5]** and **[Applicant 2]**. I note that in his affidavit (sworn 26 April 2001), **[Applicant 2]** deposes as follows:

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

Similar information is contained in the affidavits of **[Applicant 3]** and **[Applicant 5]**. Consequently, 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.

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 s.23B of the *Native Title Act*, is excluded from the clam 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 December 1996, all of the categories of previous exclusive possession acts defined in s.23B are otherwise captured. I am therefore satisfied that the claim is not made over any such areas.

S61A(3) Previous Non-Exclusive Possession Acts

The applicants do not specifically state that they do not claim exclusive possession over areas covered by previous non-exclusive possession acts.

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 claimed in the current application, and that the rights and interests they claim are not claimed exclusively 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.

S61A(4) - s.47, 47A 47B

The applicants do not claim the benefit of ss47. 47A or 47B in relation to any land or waters in the claim area.

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

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 the claimants state that they do not claim ownership of "minerals, petroleum or gas wholly owned by the Crown".

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

The current claim does not include any offshore places; nor does the application indicate a claim to such places.

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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