

National Native Title Tribunal

REGISTRATION TEST

EDITED REASONS FOR DECISION

DELEGATE: Danielle Malek

Application Name: Bar-Barrum People #4

Names of Applicants: Mrs Layne Malthouse, Mr Tennyson Kynuna, Ms Lynette Burke

Region: FNQ NNTT No.: QC01/32

Date Application Made: 28 September 2001 Federal Court No.: Q6030/01

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

DECISION

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

Danielle Malek

12th December 2002
Date of Decision

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

Brief History of the Application

The original application was filed in the Federal Court, Queensland District Registry, on 28 September 2001. The application was made in response to a low impact exploration permit (application notice) issued pursuant to the *Mineral Resources Act 1989 (Qld)*. A notice of motion to amend, together with an amended application, was filed in the Federal Court on 15 March 2002. On 28 March 2002, Deputy District Registrar Robson of the Federal Court granted leave to the applicants to amend the application.

Information considered when making the Decision

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

- The National Native Title Tribunal's administration files, legal service files and registration testing files for QC01/32.
- The National Native Title Tribunal's administration files, legal service files and registration testing files for the other native title determination applications made by the Bar-Barrum people: Bar-Barrum people #2 (QC01/17), Bar-Barrum people #3 (QC01/18), Bar-Barrum people #5 (QC01/33), Bar-Barrum people #6 (QC01/34), Bar-Barrum people #7 (Q01/35).
- 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.
- Preliminary Anthropological Assessment of the Bar-Barrum Native Title Claim by [Anthropologist 1] and [Anthropologist 2], October 1997
- The determination of native title made in relation to the Bar-Barrum People's application QC96/105 on 28 June 2001

Copies of material provided directly to the Registrar by the applicants in relation to my consideration of the application were provided to the State on 15 November 2002. The State did not provide any comments in relation to this material.

Note: 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 (Cth)* unless otherwise specified. All references to 'the application' refer to the amended application filed on 15 March 2002 unless otherwise specified.

A. Procedural Conditions

s.190C(2)

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

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

Details required in section 61

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

Reasons relating to this sub-condition

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

I note that the description of the native title claim group at Schedule A is different from the claim group description in the determined Bar-Barrum #1 application (QC96/105), in which an entire list of the claimant group was attached. In response to a query from the Tribunal regarding this discrepancy, legal representative for the applicants, [Solicitor 1 – name deleted], noted that the change was the result of further anthropological work on the genealogy of the Bar-Barrum People. In a letter to the registration test officer (dated 12 March 2002), [Solicitor 1] explained that extensive anthropological work had been conducted by the Bar-Barrum since the time of the first determination, but that all the persons listed in the first determination were descendants of those people named as apical ancestors in the current application. In short, the new description did not exclude any persons from the native title claim group who were not included in the previous application.

In addition, 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. As a result, I am satisfied that the group described includes all the persons who, according to their traditional laws and customs, hold the native title claimed.

Result: Requirements met

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

Reasons relating to this sub-condition

The names of the applicants are provided at Part A of the application and the address for service is provided at Part B.

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 the *Native Title (Federal Court) Regulations* 1998.

s.61(5)(b)

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

s.61(5)(c)

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

s.61(5)(d)

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

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

Result: Requirements met

Details required in section 62(1)

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

Reasons relating to this sub-condition

There are three applicants. Each applicant has sworn an affidavit that addresses the matters required by s.62(1)(a)(i) to (iv). These affidavits, which were included with the original application, were re-sworn by each applicant on 12 March 2002 and included with the amended application. The affidavits are all dated, signed by each deponent and competently witnessed. Affidavits sworn by each of the applicants addressing the basis for authorisation as required by s.62(1)(a)(v) are provided at Attachment R of the original application. I am satisfied that these affidavits form part of the application as required by s.61(5). I am also 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 affidavit of **[Person 1 – name deleted]** at Attachment F (provided with the original application). This provides 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 is 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 maps contained in the application show the external boundaries of the claim area.

Result: Requirements met

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

Reasons relating to this sub-condition

Schedule D states that no searches have been conducted.

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 application contains a general description of the factual basis upon which it is asserted that the native title rights and interests claimed exist. At Schedule F the applicants state that the native title group and its apical ancestors have and had a clear association with the area, continue to maintain their customs and traditions and continue to hold native title in accordance with those laws and customs. The 'general description' required by this section is found in the application at Schedule F which in turn refers to the affidavit of **[Person 1]** at Attachment F. The information in Schedule G also provides a general description of the factual basis. Refer also to my reasons for decision under s.190(B)5 below.

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

At Schedule F, the applicants state that lots within and adjacent to the area have been determined as native title already. Schedule F also notes that **[Applicant 1 – name deleted]** was raised in the Petford area and that the Bar-Barrum are owner-occupiers of Emu Creek Station (540 OL450 and 3HG716 - which is within the application area). Schedule F also refers to the affidavit of **[Person 1]** at Attachment F.

The affidavit of **[Person 1]** attests to the association of the native title claim group and their predecessors with the claim area. In his affidavit, **[Person 1]** refers to a range of activities that he carries out in the claim area together with members of his family (including his parents, uncles, cousins, children and grandchildren), and other Bar-Barrum families. Refer:

- Affidavit of **[Person 1]** paras 5-8, 12, 13, 15-19

The affidavit also refers to activities carried out by the Bar-Barrum in the claim area and to certain traditional Bar-Barrum camping areas. Refer:

- Affidavit of **[Person 1]** paras 12, 15

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

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

The affidavit of **[Person 1]** attests to the existence of traditional laws and customs that give rise to the claimed native title. In his affidavit, he refers to traditional laws and customs relating to knowledge and use of bush medicine, hunting and fishing techniques, traditional dances, songs and ceremonies, and knowledge of significant sites and the stories associated with them. He also refers to teaching traditional Bar-Barrum customs to Bar-Barrum children and to behaviours that must be observed at certain special sites. Refer:

- Affidavit of **[Person 1]** paras 8-19

At Schedule G of the application the applicants describe 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. They also state that they maintain spiritual connection with Bar-Barrum country.

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

The affidavit of **[Person 1]** supports the assertion that the native title claim group has continued to hold the native title in accordance with traditional laws and customs. Refer to my reasons under s.62(2)(e)(ii) above. **[Person 1]** 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). He also deposes that there are special sites where Bar-Barrum people must talk to the spirits before visiting (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

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

Result: Requirements met

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 of the application is marked 'not applicable'. In an assessment dated 10 October 2002, the Tribunal's Geospatial Unit stated that no other claimant or non-claimant applications fall within the external boundaries of the current application. This result was confirmed in a further Geospatial assessment dated 15 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

At Schedule I of the application the applicants state that no notices have been received. In the assessments dated 10 October 2002 and 15 November 2002, the Tribunal's Geospatial Unit identified one s.29 notice over the claim area: high impact exploration permit notice EPM 13406.

Section 62(2)(h) requires that the application contains 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*. However, the notice relates to activity that corresponds or is equivalent to s.26A of the Act.

I am therefore of the opinion that, as the 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 28 September 2001 and for the purposes of s.190C(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 are on the Register of Native Title Claims, as a result of a consideration pursuant to s.190A. This was confirmed in the assessment prepared by the Tribunal's Geospatial Unit dated 15 November 2002. Consequently, I am 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

In affidavits (marked Attachment R of original application), the applicants depose to being Bar-Barrum people and the children of a named Bar-Barrum parent. In each case the applicants refer to ancestors that establish that they are descended from an ancestor named in Schedule A.

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

Applicants authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group.

Information about authorisation is found in the application at Schedule R – this, 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. In addition to the affidavits attached to the original application, the applicants have sworn fresh s.62 affidavits dated 12 March 2002; these are attached to the amended application. The applicants' s.62 affidavits state that they are authorised by all persons in the native title claim group to make the application and to deal with matters arising in relation to it.

Affidavits addressing the basis for authorisation sworn by the three applicants are provided at Attachment R of the original application. Each of these affidavits states that the applicant is authorised by the Bar-Barrum People, through a traditional and customary decision-making process that must be complied with by the Bar-Barrum, to make the application.

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

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

The affidavits outline how the Bar-Barrum People arrived at a decision to authorise the applicants to make this new application at a meeting of Bar-Barrum people on 7 July 2001 in Herberton. At Schedule A2 of the application, the applicants state that the Bar-Barrum People this meeting authorised the present application according to Bar-Barrum tradition and custom.

Further information about the authorisation meeting of 7 July 2001 was provided by the applicants' legal representative in a letter dated 17 May 2002. **[Solicitor 1]** states that this meeting 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. Around 50 Bar-Barrum people attended the meeting (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.

Additionally, in a preliminary assessment of the amended application provided to the applicants by letter dated 2 October 2002, it was noted that there were different combinations of applicants in the various Bar-Barrum applications. Although the Tribunal noted that the use of different applicants in relation to different areas did not necessarily reflect adversely on the proper authorisation of the claims, the distinction was noted for comment. In a letter dated 31 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 Day family asserts a closer relationship to the Mt Garnett area (Bar-Barrum applications #2 and #3); while [Applicant 1] 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-Barrum 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 s.190C(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. The written description of the external boundary is found at Schedule B of the application. This written description is supplemented by a map showing the external boundary of the application area. Schedule C of the amended application, filed on 15 March 2002, refers to a new map attached to the application. This is an amended map prepared by the Tribunal's Geospatial Unit dated 4 February 2002.

The written description at Schedule B defines the claim area as being comprised of a number of parcels of land (26 whole land parcels and two part parcels), each described with a lot and plan number. The claim area description was amended in the Federal Court under the 'slip rule' to exclude lot 12 on LD802444 (part of Lot 72 on SP132529). The advice of the Tribunal's Geospatial Unit was that the former Lot 4872 on PH2230 listed in the original application is now Lot 72 on SP13259 and is a consolidation of Lot 4872 on PH2230, Lot 12 on LD802444 and an area excised and opened as road. The addition of Lot 12 on Lot LD802444 would have increased the claim area.

The amended application includes only that part of Lot 72 SP132259 that correlates with former Lot 4872 on PH2230 and excludes Lot 12 on LD802444 and dedicated roads. A number of other typographical errors identified by the Tribunal's Geospatial Unit and the Queensland State Government were also corrected in the amended application. An amended map with a notation excluding Lot 12 on LD 802444 dated 26 March 2002 was prepared by the Tribunal's Geospatial Unit. A copy of this map was provided to the applicants on 4 March 2002, however this map was not filed in the Federal Court with the first amended application.

In an assessment dated 10 October 2002 the Tribunal's Geospatial Unit concluded that the map and written description were not consistent. The Unit explained that although Schedule B had been amended to exclude Lot 12 on LD802444, the map filed with the first amended application did not exclude Lot 12 on LD 802444. The Geospatial unit were of the opinion, however, that if the applicants were to replace the map with the correct map (dated 26 March 2002), then the description and map would be consistent and identify the amended application area with reasonable certainty.

The replacement map, dated 26 March 2002, was filed in the Federal Court on 4 November 2002. The Federal Court noted that the change did not amount to an amendment of the application but rather a correction of the application according to the slip rule.

This map identifies each of the parcels described in Schedule B with a lot/plan number and includes scale, north point and geographic co-ordinates. I am satisfied that the lot/plan references listed in Schedule B and on the map enables these parcels to be identified and located, according to the State of Queensland's land and tenure records. I am also satisfied that the written description and map satisfactorily locate the external boundaries of the claim area on the earth's surface, allowing the claim area to be identified with reasonable certainty. This was confirmed by the assessment prepared by the Tribunal's Geospatial Unit on 15 November 2002.

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 (which deals with previous exclusive possession acts). The tenures listed in the application are not restricted to those that meet the criteria of s.23B (2) (a) and (b). However, in my view 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, I note that dedicated roads, dedicated road reserves and creeks or rivers dedicated to the State of Queensland are excluded from the claim area.

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

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

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

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

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

The description of the persons in the group is found at Schedule A of the application. The membership of the group is said to be the Bar-Barrum people, who are descendants of the named Bar-Barrum apical ancestors. As noted in my reasons under s.61(1) above, I am satisfied that all the persons encompassed in the list in the first Bar-Barrum determination are included in the native title claim group description of the current application.

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

Consequently, 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.

Result: Requirements met

s.190B(4)

Identification of claimed native title:

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

Reasons for the Decision

Native title rights and interests claimed by the applicants

At Schedule E of the application the applicants claim that they are entitled to “possess, occupy, use, and enjoy the determination area in accordance with and subject to their traditional laws and customs, and the force and operation of laws of the Commonwealth and the State.”

Further to this general right, the applicants claim particular rights which derive from, or are said to be “particular” to the core right of possession, use, enjoyment, and occupation of the land and waters of the subject area. These rights are listed in Schedule E as a set of five itemised rights and interests (marked paras. (a)-(e)). Paragraph (c) is further particularised into six other rights and interests. The particular rights which the applicants see as flowing from a general right to “possess, occupy, use, and enjoy the determination area” are rights to:

- (a) live on the area;
- (b) conserve the natural resources of the area for the benefit of the common law holders;
- (c) maintain, use, manage and enjoy the area for the benefit of the common law holders, that is to:
 - (i) maintain and protect sites of significance to the common law holders and other Aboriginal people within the meaning of that term in the *Native Title Act 1993* (Cth);
 - (ii) inherit, dispose of or give native title rights and interests in the determination area to others provided that such persons are Aboriginal people within the meaning of that term in the *Native Title Act 1993* (Cth);
 - (iii) decide who are the Bar-Barrum people, provided that such persons must be Aboriginal people within the meaning of that term in the *Native Title Act 1993* (Cth);
 - (iv) regulate among and resolve disputes between, the common law holders in relation to the rights of possession, occupation, use and enjoyment of the area;
 - (v) conduct social, religious, cultural and economic activities on the area;
 - (vi) exercise and carry out economic life on the area, including harvesting, fishing, cultivating, management and exchange of economic resources;
- (d) conserve, use and enjoy the natural resources of the area, for social, cultural, religious, spiritual, customary and traditional purposes; and
- (e) make decisions about and control the access to and the use and enjoyment of, the area and its natural resources by the common law holders.

The applicants add that: ‘Where USL land is claimed the Bar-Barrum people claim exclusive possession, however the Bar-Barrum people recognise other interests such as the co-existing statutory rights of holders of validly granted or validated tenures’ (refer Schedule E). At Schedule L, the applicants claim the benefit of s47B in relation to all vacant crown land (or USL land) in the application area.

These statements suggest that where the applicants claim the benefit of s47B (i.e., vacant Crown land within the application area - Schedule L), the rights and interests in Schedule E are claimed exclusively; in all other areas, the rights and interests in Schedule E are claimed non-exclusively (i.e., subject to other interests). Furthermore, considering the construction of the description of native title rights and interests claimed in Schedule E, the applicants claim a general exclusive right to “possess, occupy, use, and enjoy the determination area” (and those rights and interests said to flow from this core right) in relation to vacant Crown land in the application area; in relation to other areas, the construction of Schedule E suggests that the applicants claim a non-exclusive right to “possess, occupy, use, and enjoy the determination area” (and those rights and interests said to flow from this core right).

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

1. “It is duly noted that ‘the native title rights and interests claimed are subject to the laws of the State and the Commonwealth generally and to any other valid acts of adverse dominion’”: Schedule B.
2. The native title claim group does not claim ownership of minerals, petroleum, or gas wholly owned by the Crown: Schedule Q.
3. The applicants do not claim exclusive possession over any offshore place: Schedule P

The requirements of the Act

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

S62(2)(d) requires that the application contain “a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests) but not merely consisting of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.” This terminology suggests that Parliament intended to screen out applications which describe native title rights and interests in a manner which is vague, or unclear.

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

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'.

Some interests which may be claimed in an application may not be native title rights and interests and are not ‘readily identifiable’ for the purposes of s190B(4). These are rights and interests which the courts have found to fall outside the scope of s223. Rights which are not readily identifiable include the rights to control the use of cultural knowledge that goes beyond the right to control access to lands and waters,² rights to minerals and petroleum under relevant Queensland legislation,³ an exclusive right to fish offshore or in tidal waters, and any native title right to exclusive possession offshore or in tidal waters.⁴

¹ *Queensland v Hutchinson* (2001) 108 FCR 575.

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

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

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

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

Result: Requirements met

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 s.190B(5), the Registrar (or his delegate) is not limited to consideration of statements contained in the application (as for s.62(2)(e)) but may refer to additional material supplied to the Registrar under this condition: *Martin v Native Title Registrar* [2001] FCA 16. Regard will be had to the application as a whole; subject to s190A(3), regard 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.⁵

In essence, I must be satisfied, pursuant to s.190B(5), that a sufficient factual basis is provided to support the assertion that the rights and interests claimed in the application exist. In particular, I must be satisfied that the factual basis provided is sufficient to support those assertions: that the native title claim group have, and their predecessors had, an association with the area claimed; 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.190B(5)(a) -(c) are met is provided in Schedule F of the application. This in turn refers to the affidavit of [Person 1] at Attachment F. Schedule G provides details of activities currently carried out within the claim area. Schedule M similarly refers to and relies upon the affidavit of [Person 1]

⁵ See *Ward* at [382].

at Attachment F in relation to the traditional physical connection of members of the claim group to the area claimed.

Pursuant to s.190A(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 (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 2002. In that letter, legal representative for the applicants also confirmed that consideration was to be had to the report in relation to the s.190B(5) condition of the registration test:

'the Bar-Barrum applicants have instructed that the Registrar may make reference to the Connection report of **[Anthropologist 1]** 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;

In Schedule F of the application the applicants state that lots within and adjacent to the area have been determined as native title already. They also state that **[Applicant 1]** was raised in the Petford area and the Bar-Barrum are owner occupiers of Emu Creek Station (540 on OL450 and 3HG716) which is within this application.

The factual basis provided in the affidavit of **[Person 1]** is sufficient to support an assertion that the Bar-Barrum People have an association with the claim area and are descended from people who also had an association with the claim area. The deponent provides examples of his association and the association of his parents, uncles, grandchildren and other relatives with the area claimed. See:

- Affidavit of **[Person 1]** (27 April 2001) paras 4-9, 11-13, 15-19;

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). Due to the isolated and rugged terrain inhabited by the Bar-Barrum, there is little reference to the Bar-Barrum in nineteenth- and early twentieth century literature. Nevertheless, more recent research unanimously holds that the Bar-Barrum people were and are the sole indigenous inhabitants of that country located about the Great Dividing Range west of Atherton, with a distinctive language and a kinship system in common with that of other groups in the Cape York Peninsula. The authors refer to the work of Roth on the unique Bar-Barrum language, and to the work of Sharp on the social organisation of the tribes of north-east Australia (1939).

The 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), the affidavit of [**Person 1**] at Attachment F refers to traditional laws and customs relating to knowledge and use of bush medicine, hunting and fishing techniques, traditional dances, songs and ceremonies, knowledge of traditional tribal boundaries, significant sites and the stories associated with them. The affidavit also refers to teaching traditional Bar-Barrum customs to Bar-Barrum children and to behaviours that must be observed at particular special sites. Refer:

- Affidavit of [**Person 1**] (27 April 2001) paras 7-19;

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 c(ii), c(iii)).
- 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 b, c(i), d, e).
- 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 c(ii), c(iv), c(v), c(vi)). 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 c(v), c(vi), d).

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

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

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

- The affidavit of **[Person 1]** 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.
- 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 are found at Schedule G.
- In the report of **[Anthropologist 1]** and **[Anthropologist 2]** the authors outline modifications to traditional Bar-Barrum kinship systems, systems of governance and rules of succession that have occurred since European contact, and clearly identify the roots of contemporary practices in traditional laws and customs. They also document the ongoing transmission of cultural knowledge relating to the availability of food resources and raw materials, hunting and gathering techniques and manufacture of tools and artefacts.

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

Conclusion

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

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 by the native title group can be established. The Registrar takes the view that this requires only one right or interest to be registered.

I have noted already the description of native title rights and interests claimed by the applicants under my reasons for decision for s190B(4) of the registration test. The description is said to be an entitlement to “possess, occupy, use, and enjoy the determination area in accordance with and subject to their traditional laws and customs, and the force and operation of laws of the Commonwealth and the State.” The applicants then list a number of native title rights and interests which are said to *flow or be derived from* this core right to possess, occupy, use and enjoy the land, and which are “particular to” the general right. These rights and interests are expressed as rights to:

- (a) live on the area;
- (b) conserve the natural resources of the area for the benefit of the common law holders;
- (c) maintain, use, manage and enjoy the area for the benefit of the common law holders, that is to:
 - (i) maintain and protect sites of significance to the common law holders and other Aboriginal people within the meaning of that term in the *Native Title Act 1993* (Cth);
 - (ii) inherit, dispose of or give native title rights and interests in the determination area to others provided that such persons are Aboriginal people within the meaning of that term in the *Native Title Act 1993* (Cth);
 - (iii) decide who are the Bar-Barrum people, provided that such persons must be Aboriginal people within the meaning of that term in the *Native Title Act 1993* (Cth);
 - (iv) regulate among and resolve disputes between, the common law holders in relation to the rights of possession, occupation, use and enjoyment of the area;
 - (v) conduct social, religious, cultural and economic activities on the area;
 - (vi) exercise and carry out economic life on the area, including harvesting, fishing, cultivating, management and exchange of economic resources;
- (d) conserve, use and enjoy the natural resources of the area, for social, cultural, religious, spiritual, customary and traditional purposes; and
- (e) make decisions about and control the access to and the use and enjoyment of, the area and its natural resources by the common law holders.

Furthermore, considering the construction of the description of native title rights and interests claimed in Schedule E, the applicants appear to claim an exclusive right to “possess, occupy, use, and enjoy the determination area” (and those rights and interests said to flow from this core right) only in relation to vacant Crown land in the application area (see also Schedule L). In relation to other areas, the construction of Schedule E suggests that the applicants claim a non-exclusive right to “possess, occupy, use, and enjoy the determination area” (and those rights and interests said to flow from this core right in these areas).

The right to possess, occupy, use, and enjoy the determination area:

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

However, the Court indicated that such a claim may only be able to be established *prima facie* in relation to some parts of a claim area, such as those areas where there has been no previous extinguishment of native title, or where extinguishment is to be disregarded (i.e., where the applicants claim the benefit of ss.47, 47A or 47B). Over areas where a claim to exclusive possession cannot be sustained (i.e., where the claim is non-exclusive in nature), the Court has indicated that a claim to ‘possession, occupation, use and enjoyment’ of the land and waters cannot, *prima facie*, be established. In other words, where native title rights and interests do not amount to an exclusive right, as against the whole world, to possession, occupation, use and enjoyment of the claim area, the Court said that “it will seldom be appropriate or sufficient, to express the nature and extent of the relevant native title rights and interests by using those terms”: at [51].⁷ Similarly, in *De Rose v South Australia* [2002] FCA 1342, O’Loughlin J said that such a description was “inappropriate”: at [919].⁸

It would seem, then, that without further investigation, a non-exclusive right to possession, occupation, use and enjoyment is not capable of being established *prima facie*. The term ‘*prima facie*’ was considered in *North Galanjanja Aboriginal Corporation v Qld* (1995) 185 CLR 595 by Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ, who noted:

“While the expression ‘*prima facie*’ can have various shades of meaning in a particular statutory context, the ordinary meaning of the phrase 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. I note that while the High Court has said that recognition of a non-exclusive right to possession, occupation, use and enjoyment of lands and waters would be rare, this does not mean that a court may not recognise such a native title right (nor that applicants are precluded from claiming such a right). Nonetheless, the registration test under s190B(6) is expressed as a ‘*prima facie*’ test.

In light of the comments of the majority of the High Court in *Ward* and of O’Loughlin J in *De Rose*, it does not appear that a non-exclusive right to possession, occupation, use and enjoyment can, on the face of it, be established pursuant to s190B(6). Similarly, as Schedule E is constructed in such a way that the ‘particular’ rights and interests listed there are said to flow from or be particular to the non-exclusive right to possess, occupy, use and enjoy the land and waters of the application, these rights are also not able to be established *prima facie*.

That said, I will consider the particularised rights and interests claimed by the applicants in Schedule E as they relate to the exclusive claim to possess, occupy, use, and enjoy those areas of land and waters for which the applicants claim the benefit of s47B (see Schedule L).

(a) *Live on the area*

Established.

In Schedule G, the applicants state that the Bar-Barrum People live on and visit Bar-Barrum country and are in continuous use and occupation of that country. In his affidavit dated 15

⁶ At [51].

⁷ Refer also *Ward*, [48], [52], [53] and [89].

⁸ Refer also *De Rose*, [918]-[920]

August 2001 [Person 1] speaks of camping on and occupying the country under claim (paras 5-7, 15). He also deposes that he lived and raised his family at Emu Creek and currently lives in Dimbulah, in Bar-Barrum Country (paras 21-22). At Schedule F the applicants state that the Bar-Barrum are owner-occupiers of Emu Creek Station (Lot 540 on OL450 and Lot 3 on HG716) which is within this application. I note also the statement in Schedule L of the application that at the time of filing this application the Bar-Barrum people occupied and continue to occupy all vacant crown land (unallocated State land) in this application.

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

(b) *conserve the natural resources of the area for the benefit of the common law holders*

Established.

In his affidavit, [Person 1] deposes to involvement in cultural heritage work in the claim area and working with the Department of Environment and Heritage. He states that, in this way, he has cared for country and been involved in environmental and cultural management (para 16). At Schedule G of the application the applicants state that the Bar-Barrum people collect food resources and gather their livelihood from natural resources on Bar Barrum country.

(c) *maintain, use, manage and enjoy the area for the benefit of the common law holders, that is to:*
(i) *maintain and protect sites of significance to the common law holders and other Aboriginal people within the meaning of that term in the Native Title Act (Cth)*

Established

In his affidavit, [Person 1] deposes to involvement in cultural heritage work in the claim area and working with the Department of Environment and Heritage (para 16, but more generally 16-18). He also refers to passing on the knowledge of these sites and the stories relating to them to his grandsons and other young people and the importance of observing appropriate behaviour at these sites (paras 17-19). Schedule G provides information relating to the claimants carrying out cultural heritage protection work on country.

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).

(ii) *inherit, dispose of or give native title rights and interests in the determination area to others provided that such persons are Aboriginal people within the meaning of that term in the Native Title Act (Cth)*

Established.

The affidavit of **[Person 1]** provides evidence for the transmission of cultural knowledge directly related to the use of the land: for example, observance of customary rules when fishing, learning usages for fauna and flora on country for medicinal purposes, visiting significant places and passing on of knowledge between the generations about culturally significant places on country. See:

- Affidavit of **[Person 1]** , paras 8-9, 10-11, 14, 16-18;

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

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 c(iii) below). The authors also document how knowledge of the seasonal availability of resources is passed down from generation to generation (for example from grandfather to grandson in the **[Family 1]** family), where certain species can be found and hunting and gathering techniques. They also describe how one of the applicants, **[Person 1]**, 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.

- (iii) *decide who are the Bar-Barrum people, provided that such persons must be Aboriginal people within the meaning of that term in the Native Title Act (Cth)*

Established.

The affidavits at Attachment R regarding authorisation indicate that membership of the group is determined through traditional law and custom. There appears to be no discretion to deviate from these rules. Thus, the native title claim group is only able to determine who are the native 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 1]** and **[Applicant 2 – name deleted]**) or through their mother (in the case of **[Applicant 3 – name deleted]**). 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.

- (iv) *regulate among and resolve disputes between, the common law holders in relation to the rights of possession, occupation, use and enjoyment of the area;*

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.

(v) *conduct social, religious, cultural and economic activities on the area;*

Established

In his affidavit [Person 1] refers to a range of economic activities carried out in the claim area. He deposes that he and his family hunt, fish, gather bush medicine, firewood, timber and other forest products and make tools and artefacts in the claim area. (paras 8-9, 13-15, 20). He also refers to religious and cultural activities such as traditional dancing, paying respect to spirits at significant sites and teaching young people about Bar-Barrum culture on country (paras 10, 11, 17, 19). At Schedule G of the application the applicants state that the Bar-Barrum people collect food resources and gather their livelihood from natural resources on Bar Barrum country, and teach Bar-Barrum children about Bar-Barrum culture on country.

In the anthropological assessment of the Bar Barrum people's application, the authors document how knowledge of the seasonal availability of resources (where certain species can be found and hunting and gathering techniques) is passed down from generation to generation - for example from grandfather to grandson in the [Family 1] family. They also describe how one of the applicants, [Person 1], 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) *exercise and carry out economic life on the area including harvesting, fishing, cultivating, management and exchange of economic resources;*

Established.

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

The affidavit of **[Person 1]** states that he and his family hunted, fished and foraged for bush foods, bush medicine, timber and firewood, and conducted mining activities on the land (paras 8-9, 12-14, 19). At Schedule G of the application, the applicants state that the Bar-Barrum people collect food resources and gather their livelihood from natural resources on Bar Barrum country.

In the anthropological assessment of the Bar Barrum people's application, the authors document how knowledge of the seasonal availability of resources, where certain species can be found and hunting and gathering techniques, is passed down from generation to generation, for example from grandfather to grandson in the **[Family 1]** family. They also describe how a member of the native title claim group, **[Person 1]**, 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.

(d) *conserve, use and enjoy the natural resources of the area for social, cultural, economic, religious, spiritual, customary and traditional purposes*

Established.

This right is closely linked to the rights at (c)(v) and (b). Refer to my reasons for decision above. See also:

- Affidavit of **[Person 1]**, para. 8-9, 12-14, 19

(e) *make decisions about, and control the access to and the use and enjoyment of, the area and its natural resources by the common law holders.*

Established

This right amounts to a right to control access to and use of the claim area which can only be established *prima facie* over areas where exclusive possession can be made out (as in areas where the applicants claim the benefit of s47B).

Schedule G provides information relating to the claimants carrying out cultural heritage protection work on country. In his affidavit, **[Person 1]** refers to a range of economic and cultural activities carried out on the claim area. These necessarily involve making decisions about the use and enjoyment of the area and its natural resources.

In the anthropological assessment of the Bar Barrum people's application the authors document the knowledge of significant sites in Bar Barrum country maintained by the Bar-Barrum and note that they continue to observe site relevant constraints on behaviour and also ask others to observe them (p. 69). Refer also to my reasons under (c)(iv) above.

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 'possess, occupy, use and enjoy' lands and waters is also established *prima facie*, over areas where exclusive possession can be made out.

B. Over areas where exclusive possession cannot be made out

No rights and interests established

Conclusion

I find that all the rights and interests claimed are established over areas where exclusive possession can be made out (ie over areas of vacant Crown land- unallocated State land- where the applicants claim the benefit of s.47B). I find that none of the rights and interests claimed can be established over areas where exclusive possession cannot be made out.

I need only be satisfied that 'some' of the claimed rights and interests are established. As all of the claimed rights have been *prima facie* established over areas where exclusive possession can be made out, the requirements of s.190B(6) are met.

Result: Requirements met

s.190B(7)

Traditional physical connection:

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

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

Reasons for the Decision

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

I refer to the affidavit of [Person 1] (15 August 2001) at Attachment F of the application. I have had regard to his sworn testimony providing information:

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

I am satisfied that the deponent is a member of the native title claim group. The deponent provides information to support the assertion that he has a traditional physical association and connection with the claim area that is continuous and is current.

Result: Requirements met

s.190B(8)

No failure to comply with s.61A:

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

Reasons for the Decision

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

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 claim area. Although the description of tenures excluded from the claim area in Schedule B is not limited to those tenures that are valid and granted on or before 23 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 state that they do not claim exclusive possession over areas covered by previous non-exclusive possession acts.

However Schedule E of the application states that the native title rights and interests claimed are in accordance with and subject to the force and operation of laws of the Commonwealth and the State, and this statement is repeated in Schedule J. Schedule E also states:

'where USL land is claimed the Bar-Barrum people claim exclusive possession, however the Bar-Barrum people recognise other interests such as the co-existing statutory rights of validly granted or validated tenures '

This statement is repeated in Schedule J (the draft order) of the application.

Accordingly, I am satisfied that the applicants' intention was to qualify the exclusivity of the rights and interests. I have read this exclusion to mean that the rights and interests claimed do not extend to excluding others in respect of any area where a previous non-exclusive possession act as defined in s.23F was done or a valid non-exclusive tenure exists which, at law affects permanently the rights or interests of native title holders.

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

At Schedule L the applicants claim the benefit of s.47B in relation to vacant crown land (unallocated State land) in the claim area.

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

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

Result: Requirements met

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

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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