NATIONAL NATIVE TITLE TRIBUNAL

REGISTRATION TEST

REASONS FOR DECISION

DELEGATE: Simon Nish

Application Name: Bar-Barrum People

Names of Applicant(s): Mr Tom Congoo, Mr John Wason

Region: Far North Queensland NNTT No.: QC96/105

Date Application Made: 08/11/96 Federal Court No.: QG6222 of 1998

DECISION – Bar-Barrum People

The application IS ACCEPTED for registration pursuant to s.190A of the *Native Title Act* 1993 (C'th).

Simon Nish

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

Date of Decision

14 March 2001

Brief History of the Application

The original application was lodged with the Tribunal on 8 November 1996. A notice of motion to amend, together with an amended application was filed in the Federal Court on 28 May 1999. On 4 June 1999, Deputy District Registrar Robson of the Federal Court in Brisbane granted leave to the applicants to amend the application. Application QC96/105, as amended in May 1999, was considered and accepted for registration pursuant to s190A on 25 June 1999.

A further notice of motion to amend, together with an amended application was filed in the Federal Court on 7 December 2000. On 12 December 2000, Deputy District Registrar Robson of the Federal Court granted leave to the applicants to further amend the application.

The further amendment of the application in December 2000 has triggered the requirement to consider the amended application pursuant to the requirements of s190A (cf. s64(4) & s190A(1)).

Information considered when making the Decision

In determining this application I have previously considered and reviewed the application, the first amended application (including the applicants' affidavits at attachments F, R and L) and all of the information and documents from the following files, databases and other sources:

- The Working Files QC96/105 Volumes 1, 2 and 3.
- The Personnel File QC96/105
- The Registration Test Compliance File QC96/105, including original application lodged with the Tribunal on 8/11/96, amendments thereto prior to commencement of amended NTA, and the first amended application filed 28/05/99
- The National Native Title Tribunal Geospatial Database;
- The Register of Native Title Claims;
- The Native Title Register;
- Tenure History Report for Bar-Barrum People Claimant Application prepared by the Department of Natural Resources, September 1998
- Preliminary Anthropological Assessment of the Bar-Barrum Native Title Claim by *{name deleted}* and *{name deleted}*, October 1997
- Letters from applicant's legal representative dated 18/1/99 and 7/6/99
- Statutory declaration of *{name deleted}* dated 9 February 1999

I have now considered and reviewed all relevant material including:

- the amended application filed 7/12/00
- Federal Court order dated 12/12/00
- National Native Title Register
- Register of Native Title Claims

Copies of the statutory declaration by Mr Wason (9/2/99), anthropological material (Oct 1997) and legal representative letters provided directly by the applicants for my consideration in the s190A registration of application QC96/105 have now been provided to the State. This is in compliance with the decision in *State of Western Australia v Native Title Registrar & Ors [1999] FCA 1591 – 1594*.

The State has not provided any comments in response to the contents of 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 unless otherwise specified.

Reasons for Decision

1. On 25 June 1999 I accepted native title determination application QC96/105 (QG6222/98) Bar-Barrum People for registration under section 190A of the *Native Title Act 1993.*

2. On 7 December 2000 the applicants filed an amended application in the Federal Court. On 12 December 2000 the Federal Court granted the applicants leave to amend their application in the form filed on 7/12/00, and, pursuant to s190A(1), this amended application must now be considered for registration.

3. The 2nd amended application contains these differences to the amended application filed on 28/5/99:
   - schedule D now contains the statement that *'searches have been carried out by the State of Queensland which show all the lots are claimed legitimately these records are available to the NNTT for perusal'*
   - schedule L now extends the claim to the benefit of s47B to 35 of the claimed parcels. The May 1999 application made a claim to the benefit of s47B in respect of 1 only of the claimed parcels.

4. In considering this 2nd amended application under s190A I have had particular regard to the provisions of s62(2)(c)[cf. s190C2], s190B8 [and by extension in relation to s190B(8), the provisions of s61A(2), (3) & (4)] and s190B6. I need not consider the provisions of s61A(1) as a search of the National Native Title Register and NNTT Geospatial database reveals that there are no approved determinations of native title over the claim area that would offend the provisions of s61A.

S62(2)(c)

5. Pursuant to s62(2)(c) the application must *'contain details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application'*. Schedule D of the 2nd amended application refers to a detailed tenure history report prepared by the Department of Natural Resources (Qld).

6. Although s62(2)(c) could be read widely to require applicants to disclose details and results of all searches conducted by any body or person, I am of the view that the section only requires such detailed disclosure in relation to searches conducted by the applicant.

7. There is no evidence in the material before me that the applicant has conducted any searches. Accordingly the brief statement in schedule D in relation to searches conducted by the State meets the requirements of s62(2)(c).

8. I therefore find that the requirements of s62(2)(c) are met.

S190B8 [and s61A(2), (3) & (4)]

9. Schedule L of the 2nd amended application now provides that *'At the time of the lodging of this application the Bar-Barrum People occupied and continue to occupy* [35 parcels are identified here] *and claim the benefit of [the] s47B'*. The 1st amended application only claimed the benefit of s47B in relation to one of the parcels of land claimed in the application.

10. Section 190B8 provides, relevantly, that '*the application and accompanying documents must not disclose, and the I must not otherwise be aware, that, because of section 61A (which forbids the making of applications where there have been . . . exclusive or non-exclusive possession acts), the application should not have been made'*. It is s61A(2) and s61A(3) respectively that provide an application must not be made over an area covered either by a previous exclusive possession act or previous non-exclusive possession act.

11. Section 61A(4) provides that s61A(2) or s61A(3) do not apply to an application if:
(a) the only previous exclusion possession actor previous non-exclusive possession act concerned was one whose extinguishment of native title rights and interests would be required by section 47, 47A or 47B to be disregarded, were the application to be made; and
(b) the application states that section 47, 47A or 47B, as the case may be, applies to it.

12. The 'previous exclusive possession acts' referred to in section 61A(2) and (4) are defined in s23B of the Act. The 'previous non-exclusive possession acts' referred to in section 61A(3) and (4) are defined in s23F of the Act.

13. Schedule B of the 2nd amended application provides that the application excludes areas covered by a number of tenure classes. Schedule B follows the wording employed in s23B of the Act, being the section that defines previous exclusion possession acts. By letter dated 7/6/99 the applicants' legal representatives advised that the terms used in schedule B to exclude areas from the application are as set out in s23B of the Act.

14. At schedule E of the amended application, it is stated, *'It is duly noted that the native title rights and interests claimed are subject to the laws of the state and commonwealth generally and to any other valid acts of adverse dominion.* This statement is reiterated in schedule B of the 2nd amended application. Schedule E of the 2nd amended application, in relation to the claimed rights and interests provides that the '*Bar-Barrum People are entitled to use, enjoyment and occupation of the parcels in this application, their rights co-exist with the holders of other rights and interests in the land.'* At schedule J of the 2nd amended application it is stated, *'The Bar-Barrum People have the right to occupy, enjoy, and use the determination ares 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.'* In my view it is clear from these statements in the application that the application does not claim exclusive possession over any areas covered by a non-exclusive possession act, as defined in s23F of the Act.

15. The extension of the claim to the benefit of s47B to numerous other parcels of land does not cause me to change my original findings that the requirements of s190B8 are met. Section 61A(4) provides that an application may be made if the previous exclusion possession act or previous non-exclusive possession act concerned would be required by s47B to be disregarded and the application states that s47B applies to it. The statements in Schedule L, in my view, are sufficient for the purposes of s61(4). Whether the applicants will ultimately be able to establish that s47B applies to the 35 parcels described in schedule L of the application is an issue that will need to be resolved at a contested hearing or in the course of a mediated outcome of the application.

16. I am required under s190B8 to be satisfied that there are no previous exclusive possession acts or claims for exclusivity where a previous non-exclusive possession act exists, that would forbid the making of the application.

17. I am satisfied that the application does not include any area covered by a previous exclusive possession act, by virtue of the statements in schedule B of the application excluding from the claim area any land or waters covered by the classes of tenure referred to in s23B.

18. I am also satisfied that the application does not include a claim for exclusivity in respect of the claimed native title rights and interests over any area covered by a previous non-exclusive possession act, by virtue of the statements in schedule E (supported also by the statements in schedules B and J of the application).

19. I therefore find that the requirements of s190B8 are met.

s190B(6)

20. Under s190B(6) I must consider whether, prima facie, at least some of the native title rights and interests claimed in the application can be established. In my s190A decision dated 25/6/99 I was satisfied that all of the claimed native title rights and interests claimed were prima facie established.

21. In re-considering the 2nd amended application against s190B6 I must now also have regard to the decision of the Full Court of the Federal Court in *The State of Western Australia –v- Ward* [2000] 170 ALR 159 ('Ward').

22. The majority in *Ward* held that the common law does not provide for the protection or enforcement of purely religious or spiritual affiliation with land, divorced from actual physical use of the land. I am of the view that the following right or interest offends the principles in *Ward* and can not be prima face established for registration pursuant to s190A:

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

    I consider the following right and interest to rely upon or be parasitic to the native title rights and interests that relate to actual physical use of the land established by the native title claim group for the purposes of registration and therefore consider it to be established on a prima facie basis.

    (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

23. Two further rights claimed at schedule E of the application need also to be considered in light of the refusal by the Court in *Ward* to recognise a right amounting to 'trade in resources of the claim area'. No reasons for the refusal were pronounced by the Court in *Ward*. However, the majority did find that the applicants had a right to use and enjoy "traditional resources". In the absence of judicial comment, it may be that this right fell foul of the 'on country' requirement of the rights test in that the trading could/may take place off country, and is therefore not a right which is capable of being registered.

24. The two rights that need to be considered in this regard are:

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

4(v) Have access to and use of the natural resources of the native title land including the right to use the natural resources of the native title land for social, cultural, economic, religious, spiritual customary and traditional purposes

25. I am satisfied that the terminology *'carry out economic life . . . on* [emphasis added] *the native title land'* makes it clear that the right at 3 i) relates to activities on the claim area that are not divorced from physical presence on the land. I am of the view that this right is clearly grounded in being exercised or carried out on country and for traditional purposes. Note that it is to be carried out *"on the claim area"*. The use of the phraseology *"barter"* would not, in my view, extend beyond trade in traditional resources, if read in conjunction with the evidence produced by the applicants in support of this right (refer to evidence recited in my earlier decision dated 25/6/99 under s190B5 and s190B6). I therefore find that this is a right capable of registration pursuant to s190A as, prima facie, it takes place on country and relates to trade in traditional resources.

26. I have formed the view that the wording of the right at para. 4(v) makes it clear that this right, insofar as it relates to trade at all, relates to the trade in traditional resources on the claim area and therefore should not fall foul of *Ward's case*. In this regard, para. 4(v) talks of the right *to have access to and use of the natural resources of the native title land'* for "*social, cultural, economic, religious, spiritual, customary and traditional purposes*". I find that this means use of natural resources whilst on the claim area. The listed purposes are inclusive in the sense that the right of usage must meet all of the purposes (this is because of the use of the inclusive 'and'). Therefore, the economic purpose (which would arguably include trade) must also be for a traditional purpose and would not, on the face of it, extend beyond trade in traditional resources. The evidence produced in support of this right and interest does not extend this right beyond trade in traditional resources whilst on country – refer to evidence recited in my earlier decision dated 25/6/99 under s190B5 and s190B6

27. I otherwise remain satisfied, for the reasons outlined in my earlier decision dated 25/6/99, that these two rights are prima facie established.

28. It is also necessary to consider whether any of the rights listed in schedule E of the application relating to the natural resources of the claim area could be interpreted to mean or include the right to receive a portion of any resources taken by others from the claim area. Such a right would not, on the authority of *Yarmirr v Northern Territory (1998/) 2 FCR 533*, be able to form part of a native title determination. As the Full Court has overturned Lee J's determination at first instance in *Ward*, Olney J's finding in the *Yarmirr* case must now be followed. However, I am of the view that none of the rights listed in schedule E could be interpreted as amounting to the right to receive a portion of any resources taken by others from the claim area.

Other Conditions of Registration in s190B and s190C

29. In re-considering the 2nd amended application against the remaining conditions of s190B and s190C, I am able to rely on my original findings for all the other conditions. The amendments made to schedules D and L of the application have not had any additional consequential effects on these and there has been no other legal decision in the interim that has caused me to review my initial reasoning.

30. I am satisfied that the application filed 7 December 2000 meets all the conditions of s190B and s190C and should remain on the Register of Native Title Claims, with any consequential amendment necessary to reflect the removal of the right at (ii) of schedule E of the application.

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